Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6516

CHARLES D. BRADEN,

Petitioner,

—v.—

30th JUDICIAL CIRCUIT COURT OF THE COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Date	Proceedings
1970	
Nov. 30	Motion to proceed in forma pauperis and to appoint counsel and affidavit of pauperism filed. Petition for Writ of Habeas Corpus tendered.
Dec. 10	Order signed by Judge Bratcher entered granting petitioner permission to proceed in forma pauperis, and the respondent to show cause why the writ should not be granted. Petition for Writ of Habeas Corpus filed.
Dec. 30	Response to Petition for a Writ of Habeas Corpus ad Subjiciendum filed by respondent.
1971	
Feb. 26	Memorandum and Order signed by Judge Bratcher that Jefferson Circuit Court within 60 days from date of this order either (1) secure petitioner for trial or (2) dismiss the charges against him. Copies to Petitioner, Atty. Gen. of Ky., Atty. Gen. of Ala. and Edwin Schroering, Comm. Atty., Ky.
March 26	Notice of appeal, application for certificate of probable cause and motion to dispense with appeal bond filed by respondent-appellant.
April 5	Order by Judge Bratcher that respondent may appeal without filing and posting appeal bond.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Date	Proceedings
1971	
March 30	Notice of appeal by respondent filed.
June 2	Brief for appellant filed
August 11	Appellee's petition for leave to file in forma pauperis, supporting affidavit, and motion for appointment of counsel filed.
Sept. 30	Order appointing counsel (David R. Hood) for appellee entered.
Nov. 2	Brief for appellee filed.
Nov. 19	Reply brief for appellant filed.
Dec. 13	Cause argued and submitted.
1972	
Jan. 18	Opinion filed and judgment entered reversing opinion of District Court and remanding for further proceedings.
March 23	Letter from counsel for appellee requesting transmission of record to Supreme Court.
April 20	Certified record including original record on appeal mailed to clerk of Supreme Court.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 6793

CHARLES D. BRADEN, PETITIONER

v.

30th JUDICIAL CIRCUIT COURT, Commonwealth of Kentucky, real party in interest, RESPONDENT

PETITION FOR A WRIT OF HABEAS CORPUS
AD SUBJICIENDUM

Tendered Nov. 30, 1970. Filed Dec. 10, 1970.

Comes now Charles D. Braden, personified herein after as petitioner, and files this, his application for a writ of habeas corpus ad subjiciendum, pursuant to 28 U.S.C. Sec. 2241(C)(3), et seg. [sic] and as grounds thereof shows and represents unto your honor as follows:

* STATEMENT *

On or about July 31, 1967 the Jefferson County Grand Jury filed an indictment against petitioner charging in count one, Storehouse Breaking, 433.190, and, in count two, Safe Breaking, 433.230 Sometime after this date and before November 10, 1967 petitioner was returned to Jefferson County Kentucky from California Ad prosequendum.

On or about November 18, 1967, petitioner escaped custody, upon which the Kentucky authorities obtained a federal warrent [sic] charging unlawful flight, using indictment #135047 as the bases there of [sic]. On february 24, 1968 petitioner was placed under arrest in Mobile Alabama and charged with felony crimes under Alabama State jurisdiction. Shortly after petitioner's arrest in Alabama the federal authorities notified the Kentucky authorities of petitioners arrest and place of

confinement, then droped the federal warrent. The Kentucky authorities then filed detainers against petitioner with the Mobile County Sheriffs Department.

On or about October 28, 1968, petitioner received a letter from the Jefferson County District Attorney, advising that another indictment #182150, charging, in count one, Storehouse Breaking 433.190, and in count two Safe Breaking 433.230, was also pending against petitioner, prior to that date petitioner had no knowledge of said indictment.

On or about the 3rd day of February 1969, petitioner filed demands for speedy trials into the 30th Judicial Circuit Court with a copy going to the officer prosequting [sic] the action for the Commonwealth, no action was taken on said demands. On the 3rd day of December 1969, the respondent court denied petitioner's motion to quash indictment #185047 or in the alternative return petitioner to Jefferson County for Trial.

On or about the 27th day of July 1970, respondent court dismissed petitioners application for a writ of habeas corpus ad prosequendum filed under both indictments. On the 28th day of October 1970, the Court of Appeals of Kentucky, per the chief justice denied petitioners application for mandamus in which petitioner sought to force respondent court to issue an order to begin proceeding to have petitioner returned to the Commonwealth for trials on both indictments, or dismiss said indictments, no opinion was entered by the appellate court.

On the 2d day of April 1969, petitioner was convicted on the Alabama charges and sentenced to serve a term of five years in the Alabama State Prison, of which his release date is April 7, 1974.

* CONTENTIONS *

1. Petitioner contends that he is entitled to speedy trials on indictments 185047 and 182150, although he is presently serving a prison sentence in another jurisdiction.

2. Petitioner contends that if trial on the pending indictments, 185047 and 182150 are postponed, it may impair the ability of petitioner to defend himself.

3. Petitioner contends that due to the outstanding untried indictments, there is little if any chance of parole

consideration from his present imprisonment, and the possibilities that he might receive a sentence at least partially concurrent with his present sentence may be forever lost, and the conditions under which he must serve his present sentence are greatly worsened by the pendency of the untried indictments 135047 and 132150.

WHEREFORE, petitioner prays that habeas corpus issue discharging him from custody and any further proceedings arising out of the charges on which the indictments are based, or in the alternative issue such directive that would cause respondent court to commence proceedings to have petitioner return to Jefferson County Kentucky for trials on indictments #135047 and #132150.

Respectfully submitted

/s/ CHARLES D. BRADEN
Petitioner

[Jurat Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Title Omitted in Printing]

Response to Petition for a Writ of Habeas Corpus Ad Subjiciendum

Filed December 30, 1970.

Comes now respondent by counsel in response to the petitioner's Petition for a Writ of Habeas Corpus Ad Subjiciendum and states that this Court is without jurisdiction to entertain this writ for the reason that 28 U.S.C. § 2241 does not authorize such a writ to be issued. The petitioner is not in custody within this district and the petitioner does not challenge the legality of his custody under the Alabama law. The petitioner may not use the authority of 28 U.S.C. § 2241 (c) (5) authorizing the Federal Court to procure prisoners for the purpose of testifying or for trial since that authority only applies to prisoners who are going to testify in a federal proceeding or who are going to be tried by a federal court. Huston v. State of Kansas, C.A. Kan. 1968, 390 F.2d 156; Lawrence v. Willingham, 373 F.2d 731 (10th Cir. 1967); Kirk v. State of Oklahoma, U.S.D.C., W. D. Okla, 1969, 300 F. Supp. 453.

The respondent points out that the decision in Smith v. Hooey, 393 U.S. 374, 89 S. Ct. 575, 21 L.Ed. 2d 607 (1969), was made by the Supreme Court on certiorari from the Texas Supreme Court denying the petitioner a writ of mandamus to compel the Texas Trial Court to either dismiss the charges or hold a trial. In Dickey v. Florida —— U.S. ——, the Supreme Court overturned a conviction of the Florida court on certiorari where the Supreme Court found that the petitioner had suffered actual prejudice in being denied a speedy trial. The petitioner in the case at bar may challenge the legality of any of the adverse effects of any Kentucky detainer against him in Alabama by habeas corpus in the Alabama Fed-

eral District Court. See Caruth v. Mackel, D.C.E.N.Y., Decided 7/15/70.

The respondent prays that the petition be dismissed for wont [sic] of jurisdiction over the person and for wont [sic] of jurisdiction over the subject matter.

Respectfully submitted,

JOHN B. BRECKINRIDGE
Attorney General

/s/ DAVID E. MURRELL
By: DAVID E. MURRELL
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Frankfort, Kentucky 40601

Counsel for Respondent

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 6793

CHARLES D. BRADEN, PETITIONER

v.

30th JUDICIAL CIRCUIT COURT, Commonwealth of Kentucky, real party in interest, RESPONDENT

MEMORANDUM AND ORDER

Entered Feb. 26, 1971

The above petitioner has caused to be filed with this Court his verified affidavit of poverty and motion for leave to proceed in forma pauperis on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (c) (3). On December 10, 1970, this Court entered an order granting permission to proceed in forma pauperis and the petition for writ of habeas corpus was filed without the prepayment of fees and costs or giving security therefor, pursuant to Title 28 U.S.C. § 1915 (1).

It appears from the record that in 1967 petitioner Braden was indicted by the Jefferson County Grand Jury, Louisville, Kentucky, on one count of storehouse breaking and in count two safe breaking. Sometime after the petitioner escaped custody, he was subsequently arrested in Alabama and charged with felony crimes under Alabama State law. Petitioner is presently imprisoned at the Alabama State Penitentiary where a detainer has been lodged against him by Jefferson County officials to answer the before-mentioned charges and an additional charge of storehouse breaking and safe breaking which petitioner was notified of in 1968.

Petitioner filed demands for a speedy trial in February, 1969, with the Jefferson Circuit Court and on or about October, 1970, with the Court of Appeals of Kentucky. Both demands were denied.

Petitioner is now before this Court seeking a speedy trial in all pending Kentucky charges or a dismissal of the pending charges.

The respondent contends that this Court is without jurisdiction to entertain the writ and may challenge the legality of any adverse effects of any Kentucky detainer against him in Alabama by habeas corpus in the Alabama Federal District Court.

In the case of *Smith* v. *Hooey*, 393 U.S. 374 (1969), the Court held: (1) that a state has a duty under the Constitution of the United States to attempt to effect the return of a prisoner from a foreign jurisdiction for trial on pending state charges when such prisoner so demands; and (2) that unsuccessful demands by one seeking trial are reviewable under Federal Constitutional standards. Since it is the State of Kentucky which must take action, it follows that jurisdiction rests in this district which has jurisdiction over the necessary state officials. Also see *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *Word* v. *State of North Carolina*, 406 F. 2d 352, 4th Cir. (1969); *Dickey* v. *Florida*, 398 U.S. 30 (1970).

In light of *Smith* v. *Hooey*, supra, this Court must grant the petition.

IT IS ORDERED that Jefferson Circuit Court, Louisville, Kentucky, within sixty (60) days from the date of this order either (1) secure petitioner for trial or (2) dismiss the charges against him.

Dated: February 25, 1971

/s/ RHODES BRATCHER
RHODES BRATCHER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1301

CHARLES D. BRADEN, PETITIONER-APPELLEE,

v.

30th JUDICIAL CIRCUIT COURT OF THE COMMONWEALTH OF KENTUCKY, RESPONDENT-APPELLANT.

On Appeal from the United States District Court
for the Western District of Kentucky
at Louisville

Decided and Filed January 18, 1972.

Before: EDWARDS and MCCREE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

MCCREE, Circuit Judge. We consider an appeal from the granting of a petition for habeas corpus. In July 1967, a Kentucky grand jury returned a two-count indictment charging appellee with storehouse-breaking and safe-breaking. Pursuant to this indictment, appellee was brought from California to Kentucky, whence he escaped on November 13, 1967. He was subsequently arrested in Alabama on an Alabama felony charge, and a detainer was filed against him by Kentucky authorities while he was awaiting trial on the Alabama charge. In February 1969, appellee, who was still in custody in Alabama,

filed a demand for trial on the Kentucky indictment in the Jefferson County, Kentucky, Circuit Court. Kentucky took no action on appellee's speedy-trial demand, and in April 1969 Braden was convicted of the Alabama charge and received a five-year sentence. Thereafter, Kentucky denied his subsequent motion to quash the indictment or in the alternative to return him for trial. In October 1970, the Kentucky Court of Appeals denied appellee's petition for mandamus to force the Jefferson County authorities to request his return for trial or to dismiss the indictment.

Braden then filed this petition for a writ of habeas corpus in the United States District Court for the Western District of Kentucky at Louisville, the district having jurisdiction over the Jefferson County Circuit Court. The petition, filed pursuant to 28 U.S.C. §§ 2241(c)(3), 2254, alleged that appellee was being deprived of his constitutional right to a speedy trial because of the refusal of Kentucky authorities to seek his return from Alabama for trial on the Kentucky indictment. The district court, interpreting *Smith* v. *Hooey*, 393 U.S. 374 (1968), to require it to afford a remedy, and regarding Kentucky as the state "which must take action," held that it had jurisdiction and ordered appellant to secure Braden for trial within 60 days or to dismiss the charges against him.

The principal issue on appeal is whether a district court has jurisdiction to issue a writ of habeas corpus when the petitioner is not in physical custody within the forum state. Although there is a conflict among the circuits whether a petition can be brought in the state that has issued a detainer, *compare, e.g., U.S. ex rel. Van Scoten* v. *Pennsylvania*, 404 F.2d 767 (3d Cir. 1968), with *Word* v. *North Carolina*, 406 F.2d 352 (4th Cir. 1969), the issue has recently been decided in this circuit in *White* v. *Tennessee*, 447 F.2d 1354 (6th Cir. 1971). *But cf. Himes* v. *Ohio Adult Parole Authority*, 448 F.2d 410 (6th Cir. 1971). We held in *White*, which was decided after the decision we review in this appeal, that the habeas corpus jurisdiction conferred on the federal courts by 28 U.S.C. § 2241(a) is "limited to petitions filed by persons physically present within the territorial limits of the District Court." 447 F.2d at 1354. Accordingly, we are con-

strained to reverse the decision of the district court in this case.

We reach this conclusion reluctantly because we observe that this decision possibly will result in Braden's inability to find a forum in which to assert his constitutional right to a speedy trial—a right which he is legally entitled to assert at this time under *Peyton* v. *Rowe*, 391 U.S. 54 (1968). This is a possibility because the rule in the Fifth Circuit, where appellee is incarcerated, appears to be that a district court in the state that has filed the detainer is the proper forum in which to file the petition. *See May* v. *Georgia*, 409 F.2d 203 (5th Cir. 1969). *See also Rodgers* v. *Louisiana*, 418 F.2d 237 (5th Cir. 1969). Braden thus may find himself ensnared in what has aptly been termed "Catch 2254"—unable to vindicate his constitutional rights in either of the only two states that could possibly afford a remedy. *See* Tuttle, *Catch 2254: Federal Jurisdictional and Interstate Detainers*, 82 U. Pitt. L. Rev. 489, 502-03 (1971). He is not the first state prisoner to be confronted by the dilemma posed by this inter-circuit conflict. *See U.S. ex rel. Pitcher* v. *Pennsylvania*, 314 F.Supp. 1329 (E.D. Pa. 1970). Of course, the Fifth Circuit may hold that the Alabama District Court has jurisdiction to entertain Braden's petition. *See Word* v. *North Carolina*, *supra*, 406 F.2d at 357 n.6; *cf. Nelson* v. *George*, 399 U.S. 224 (1970). In the alternative, he may be able to bring an action in the Western District of Kentucky for a declaratory judgment that he has been denied his constitutional right to a speedy trial.[1] However, since the Congress has not provided a

[1] It is, of course, well-established in this circuit that a declaratory judgment action cannot be used as a substitute for the statutory habeas corpus procedure. *Morton* v. *Avery*, 398 F.2d 138 (6th Cir. 1968); *Scruggs* v. *Henderson*, 380 F.2d 951 (6th Cir. 1967); *Forsythe* v. *Ohio*, 333 F.2d 678 (6th Cir. 1964). However, this rule is based not upon the wording of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, but instead upon judicial refusal to allow prisoners to circumvent habeas requirements such as exhaustion of state remedies (28 U.S.C. § 2254(b)). Nevertheless, appellee may be entitled to seek declaratory relief in the unusual circumstances presented by this case. We observe initially that Fed. R. Civ. P. 57 provides that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases

where it is appropriate." This indicates that a court has *power* to grant declaratory relief when another adequate remedy is available, although it may, in the exercise of its discretion, decline to do so. "The test is whether or not the other remedy is more effective or efficient, and hence whether the declaratory action would serve a useful purpose." 6A J. Moore, Federal Practice § 57.08[3], at 3031-32. *See also E. W. Bliss Co.* v. *Cold Metal Process Co.*, 102 F.2d 105, 109 (6th Cir. 1939). Moreover, even if habeas should be deemed a special statutory proceeding, the Supreme Court has indicated that "unique" circumstances will justify a district court's exercising jurisdiction over a declaratory action. *Katzenbach* v. *McClung*, 379 U.S. 294, 296 (1964). It would seem that a showing that the special statutory proceeding is inadequate to protect the plaintiff's rights or that declaratory relief would afford the plaintiff broader and more efficient protection would be sufficient to satisfy the *McClung* test. *See Roberson* v. *Great American Ins. Cos. of N.Y.*, 48 F.R.D. 404, 424 (N.D. Ga. 1969). At least one court has authorized the use of the declaratory judgment procedure when habeas corpus was also available on the ground that it afforded a more effective remedy. *Berman* v. *Resor*, 302 F. Supp. 1200 (N.D. Cal. 1969). *See also Hurley* v. *Reed*, 288 F.2d 840, 848-49 (D.C. Cir. 1961). In *Berman*, an Army reservist who had been ordered to report to active duty sought a declaratory judgment that the Army was unlawfully refusing to discharge him as a conscientious objector. The court, while noting the cases holding that the Declaratory Judgment Act cannot be used as a substitute for habeas corpus, held that it could properly entertain the declaratory action on the ground that the action "offer[ed] benefits not otherwise available." 302 F. Supp. at 1202. The plaintiff had filed the action in the Northern District of California, where he resided but where none of his "custodians" resided. (*Cf. Schlanger* v. *Seamans*, 401 U.S. 487 (1971).) The court noted that the declaratory judgment action

> enable[d] petitioner to file action [sic] in the district in which suit arose and in which the witnesses reside. If petitioner were forced to maintain the action in habeas corpus it could not be maintained in this district. 28 U.S.C. § 2241.

302 F. Supp. at 1202. In the instant case, of course, not only would the Kentucky District Court be in a position to grant Braden more effective and immediate relief, in light of its jurisdiction over the Kentucky state authorities, but there is also a serious question whether he has *any* federal district court available to him in which to file his habeas petition. In these circumstances, he may be entitled to have the Kentucky District Court entertain a complaint for a declaratory judgment, even before he files a habeas petition in the Alabama District Court, since the Kentucky Court is in a position to provide relief more speedily and less circuitously. *See Word* v. *North Carolina*, 406 F.2d 352, 357 (4th Cir. 1969); *cf. Hurley* v. *Reed*, *supra*, 288 F.2d at 849.

remedy (*see Nelson* v. *George*, *supra*, 399 U.S. at 228 n.5), *White* requires us to reverse the judgment of the court below and remand with instructions to dismiss the petition for lack of jurisdiction.

Our resolution of the jurisdictional issue makes it unnecessary to reach the question whether petitioner waived his 6th Amendment right to a speedy trial by his escape from Kentucky.

The court expresses its appreciation to David R. Hood. Esq., of Detroit, Michigan, who, without compensation, at the appointment of this court, represented the indigent petitioner-appellee with dedication and skill.

Reversed.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-1301

[Filed Jan. 18, 1972, James A. Higgins, Clerk]

CHARLES D. BRADEN, PETITIONER-APPELLEE,

vs.

30th JUDICIAL CIRCUIT COURT, COMMONWEALTH OF KENTUCKY, RESPONDENT-APPELLANT

BEFORE: EDWARDS and McCREE, Circuit Judges and McALLISTER, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for further proceedings consistent with the opinion.

It is further ordered that Respondent-Appellant recover from Petitioner-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ James A. Higgins
Clerk

SUPREME COURT OF THE UNITED STATES

No. 71-6516

CHARLES D. BRADEN, PETITIONER

v.

30th JUDICIAL CIRCUIT COURT OF KENTUCKY

On petition for writ of Ceriorari to the United States Circuit Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 12, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6516

CHARLES D. BRADEN,

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v.

30th JUDICIAL CIRCUIT COURT OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (App. 8) is reported at 454 F.2d 145 (6th Cir. 1972). The District Court issued a memorandum opinion and order which is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 18, 1972 (App. 0000). The petition for a writ of certiorari was filed on April 15, 1972, and was granted on June 12, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a petition for a writ of habeas corpus asking for relief pursuant to 28 U.S.C. §2241 may only be brought in the judicial district in which the petitioner resides.

2. Whether a state prisoner's petition for a writ of habeas corpus asking for relief pursuant to 28 U.S.C. §2241 and seeking a speedy trial or dismissal of an indictment outstanding in a foreign state court may be brought in the district court embracing that state respondent.

3. Whether the "within their respective jurisdictions" language of 28 U.S.C. §2241(a) refers to the territorial presence of a habeas corpus petitioner or his respondent.

STATUTE INVOLVED

This case involves an interpretation of 28 U.S.C. §2241, which provides:

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be

entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless–

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the

judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

STATEMENT OF THE CASE

Petitioner Braden is presently incarcerated in an Alabama state prison and is seeking the alternative relief of a speedy trial or dismissal of a Kentucky state indictment pursuant to which Kentucky authorities have filed a detainer with his Alabama warden (App. 3, 8). Kentucky is refusing to bring him to trial until his Alabama sentence has been served and Petitioner is therefore seeking habeas corpus relief in the federal courts. This case presents a matter of jurisdiction only. The facts have not been disputed and are presented in the petition for habeas corpus (App. 3) and in the findings made from the record by the district court judge as stated in the district court opinion (App. 8).

On or about July 31, 1967, the grand jury of the Jefferson County Circuit Court (30th Judicial Circuit of Kentucky) returned a two-count indictment, No. 135047, charging Petitioner with storehouse-breaking and safe-breaking (App. 3, 8). Pursuant to this indictment, Petitioner was brought from California to Kentucky,

whence he escaped on November 13, 1967 (App. 3, 8). He was subsequently arrested in Alabama and convicted of felonies there (App. 4, 8). Petitioner Braden is presently imprisoned in the Alabama State Penitentiary (App. 8) serving his second Alabama sentence, a ten-year sentence which began to run in March, 1972. A detainer was lodged against him by the Jefferson County officials in 1968 based on the charges in the Kentucky indictment (App. 4, 8). This detainer is still in effect.

Petitioner has made numerous requests for speedy trial on the outstanding Kentucky indictment. In February, 1969, he filed a demand in the Jefferson County, Kentucky Circuit Court (App. 4, 8) with a copy to the prosecuting attorney (App. 4). Kentucky took no action on his speedy trial demand (App. 4). He again demanded trial in December, 1969, but the respondent Court denied his motion to quash the indictment or return Petitioner for trial (App. 4). In October, 1970, the Kentucky Court of Appeals (the highest Kentucky state court) denied Braden's petition for mandamus to force the respondent Jefferson County authorities either to request his return for trial or to dismiss the indictment (App. 4, 8).

Failing to gain the relief in the state courts, Petitioner Braden then sought federal relief. He is incarcerated in Alabama, embraced by the United States Court of Appeals for the Fifth Circuit, and seeks a trial in Kentucky, embraced by the United States Court of Appeals for the Sixth Circuit. On November 27, 1970, he filed a petition for a writ of habeas corpus ad subjiciendum in the United States District Court for the Western District of Kentucky at Louisville (App. 3), the district embracing the respondent Jefferson County Circuit Court. Braden was without counsel in the action.

The petition, filed pursuant to 28 U.S.C. §2241(c)(3) and 28 U.S.C. §2254, alleged (1) that Petitioner was being deprived of his constitutional right to a speedy trial because of the refusal of Kentucky authorities to seek his return from Alabama for trial on the then three-year old Kentucky indictment, (2) that delay would impair his right to defend himself, and (3) that his Alabama prison term was adversely affected by the detainer (App. 4, 5).

The District Court issued a show cause order on December 10, 1970, and the Kentucky Attorney General filed a brief response arguing that the court was without jurisdiction because Petitioner was not within the district (App. 6)

In an opinion filed February 26, 1971, the district court interpreted *Smith v. Hooey*, 393 U.S. 374 (1969), as holding that the state had a duty to bring Petitioner Braden to trial and that Braden's unsuccessful demands for that trial were reviewable under federal standards. The district court then concluded that it had jurisdiction since it is the State of Kentucky, not Alabama, "which must take action" (App. 9). The court found that Petitioner was being denied a speedy trial by the State and ordered that the respondent court officials either secure Petitioner for trial within sixty days or dismiss the indictment (App. 9).

The United States Court of Appeals for the Sixth Circuit recognized that Braden had a present right, under *Peyton v. Rowe*, 391 U.S. 54 (1968), to challenge his denial of a speedy trial but reversed the district court solely on the ground that the district court lacked jurisdiction (App. 11, 12). The Sixth Circuit had very recently decided in *White v. Tennessee*, 447 F.2d 1354 (6th Cir. 1971), that such petitions could only be

brought in a district holding the prisoner's person. The Sixth Circuit Court of Appeals expressed its reluctance in reaching its decision because the split of opinions in the circuits might leave Petitioner without a remedy for the deprivation of his constitutional rights, recognizing that the rule in the Fifth Circuit, where Petitioner Braden is incarcerated, appears to be that a district court in the state that has filed the detainer is the proper forum in which to file the petition. 454 F.2d 145 at 146. (App. 12).

Petitioner now seeks relief in this Court and asks that the Court declare that the district out of which the detainer has issued is a district within which he may bring his action to enforce his constitutional right to a speedy trial.

SUMMARY OF ARGUMENT

Ahrens v. Clark, 335 U.S. 188 (1948), stands apart from and is antithetical to recent decisions of the Court which extend constitutional inquiry on petitions for a writ of habeas corpus to future restraints and which entertain claims under circumstances once thought premature. The rule of *Ahrens*—that habeas petitions may only be brought in the district of petitioner's confinement—cannot be squared with subsequent decisions which necessarily contemplate circumstances in which the focus of petitioner's grievance, perhaps a trial yet to stand or a sentence yet to serve, and the person against whom he grieves are each to be found outside the district within which he is confined. The language, legislative history, and purpose of the statute which *Ahrens* construes lend support to a conclusion that it is the presence of the custodian/respondent rather than that of

the prisoner/petitioner which is essential for jurisdiction. Further, recent decisions of the Court delineating the degree of custodial presence necessary to support habeas process present opportunity for forum choices which can greatly serve both judicial efficiency and the ends of justice. *Ahrens* at least represents the potential to thwart such progress; at worst, it stands as a rigid barrier. The rule of *Ahrens* should not be extended, as it was below, to a class of petitioners seeking a mode of relief that was not available at the time the rule was formulated.

ARGUMENT

THE CONSTRUCTION OF 28 U.S.C. §2241 THAT WAS WORKED IN *AHRENS V. CLARK* FRUSTRATES JURISDICTIONAL CHOICES THAT ARE CONSISTENT WITH THE SCOPE OF CONSTITUTIONAL INQUIRY UPON HABEAS CORPUS PETITIONS. SUCH CONSTRUCTION SHOULD BE LIMITED, IF NOT ABANDONED, AS CONTRARY TO THE LANGUAGE, HISTORY, AND PURPOSE OF THE STATUTE.

The rule of *Ahrens v. Clark*, 335 U.S. 188 (1948), has occasioned no small amount of jurisdictional confusion in the wake of recent extentions of the availability of the Great Writ to habeas petitioners complaining of restraints imposed upon them from the distance of both time and place. The reservations expressed by Justice Rutledge, writing for himself and for Justices Murphy and Black in the *Ahrens* dissent, have matured into especial contemporary pertinence. Justice Rutledge foresaw that the Court, in holding that district courts lack jurisdiction to order writs of habeas corpus when the petitioner is not physically present within the district, had enacted a "strict jurisdictional limitation which can only defeat the

writ's efficacy in many cases where it may be most needed" and warned that "the full ramifications of the decision are difficult to foresee." *Ahrens v. Clark*, 335 U.S. at 210 and 195 (1948) (Rutledge, J., dissenting). Although Petitioner's jurisdictional plight may not itself exhaust the "full ramifications" of *Ahrens*, as he views the rule from Edmond Cahn's "consumer perspective",[1] part of its impact is unmistakable: he will at least be denied the habeas forum in which he has already prevailed on the merits of his constitutional claim, and he may well be left without a forum at all.[2]

The federal district court below found on the authority of *Smith v. Hooey*, 393 U.S. 374 (1969), that

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[1] *E. Cahn, Confronting Injustice* (1967).

[2] The circuit, below, *Braden v. 30th Judicial Circuit Court*, 454 F.2d at 146-147 (6th Cir. 1972) put it well when it stated:

> We reach this conclusion reluctantly because we observe that this decision possibly will result in Braden's inability to find a forum in which to assert his constitutional right to a speedy trial—a right which he is legally entitled to assert at this time under *Peyton v. Rowe*, 391 U.S. 54 (1968). This is a possibility because the rule in the Fifth Circuit, where appellee is incarcerated, appears to be that a district court in the state that has filed the detainer is the proper forum in which to file the petition. See *May v. Georgia*, 409 F.2d 203 (5th Cir. 1969), see also *Rodgers v. Louisiana*, 418 F.2d 237 (5th Cir. 1969).

The court continued on to observe that Petitioner may therefore find himself ensnared in what has aptly been called "Catch 2254." Id. *See* Tuttle, *Catch 2254: Federal Jurisdiction and Interstate Detainers*, 32 U. Pitt. L. Rev. 489, 502-03. *See also United States ex rel. Pitcher v. Pennsylvania*, 314 F. Supp. 1329 (E.D. Pa. 1970).

The United States Court of Appeals for the Sixth Circuit thus relegated Petitioner to a forum which might not be available to him at all, and whose availability would be predicated upon the fact that Kentucky authorities have lodged a detainer against Petitioner. If there were no detainer, Petitioner would still be seeking relief from the untried indictment.

Petitioner's right to a speedy trial was and is being denied by Kentucky state authorities. The district court was reversed by the Court of Appeals for the Sixth Circuit on the ground that the district court lacked jurisdiction to issue a writ of habeas corpus "when the petitioner is not in physical custody within the forum state." 454 F.2d 145 at 146. In so doing, Petitioner argues, the circuit court has extended the *Ahrens* already strict jurisdictional interpretation of the habeas corpus statutes to a class of habeas applicants who appear not to have been considered by the Court at the time *Ahrens* was decided, who were certainly not envisioned by legislators in 1867 when they enacted the statute *Ahrens* interprets, and who at the time of the most recent amendments to the statute had not yet been afforded by decision the right to seek habeas relief.

Ahrens was a case involving 120 German citizens held on Ellis Island in New York to await deportation after World War II. They petitioned the district court in the District of Columbia for a writ of habeas corpus, naming the Attorney General as respondent. 335 U.S. at 189. Apparently petitioners could have filed an action in the district court of their confinement, naming their immediate Ellis Island custodian as respondent, but chose not to. Thus when the Court denied their petition on the ground that the habeas statute in effect at that time limited district courts to hearing petitions of those confined within their territorial jurisdictions, 335 U.S. at 192, the *Ahrens* petitioners were not left without a remedy, but were merely sent to another district court. The majority in *Ahrens*, speaking through Mr. Justice Douglas, felt that both the history of the statute and questions of policy compelled them to construe the statute thus. 335 U.S. at 191:

The statutory construction that was worked in *Ahrens* was of 28 U.S.C. 452, as it then stood, the predecessor to the current habeas statute, providing that Supreme Court justices and judges of circuit and district courts "*within their respective jurisdictions*, shall have power to grant writs of habeas corpus . . ." [Emphasis added.] The italicized phrase was first inserted in the habeas corpus statute of 1867, 14 Stat. 385, and, since the operative language had remained unchanged, the *Ahrens* Court looked to the early legislative history. In so doing the majority concluded, largely upon a single statement made by Senator Revedy Johnson when the bill was on the floor of the Senate in 1867, that Congress had meant to limit jurisdiction to the court embracing the place where petitioner was confined when it had amended the proposed statute to add the phrase "within their respective jurisdictions." Following the amendment the 1867 statute read:

> "That the several courts of the United States and the several justices and judges of such courts, within their respective jurisdictions, . . . shall have power to grant writs of habeas corpus . . ." 14 Stat. 385 (1867).

When the entire discussion in the House of Representatives and the Senate is analyzed, it becomes extremely doubtful that Congress meant to limit jurisdiction so severely or that they meant the phrase to apply to the location of the prisoner rather than to the location of the custodian.[3] The language of the statute and of the

[3] The bill was H.R. 605, 39th Cong., 1st Sess., discussed and passed in the House of Representatives July 25, 1866. Cong. Globe, 39th Cong., 1st Sess. 4150-4151. Senate approval came on January 28, 1867, with the addition of the phrase "within their respective jurisdictions" after discussion that day and on January 25,

minutes of discussion are at least equally consistent with a conclusion that it was the location of the custodian and the reach of the court's process to the respondent which was at issue.

The purpose of the unamended bill introduced into the House was, according to Representative Lawrence who presented the bill on the floor from the Committee on the Judiciary,

> "to enlarge the privilege of the writ of *habeas corpus*, and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty, and does not interfere with persons in military custody, or restrain the writ of *habeas corpus* at all . . ." Cong. Globe, 39th Cong., 1st Sess. 4151 (1866).

The bill (and the statute) speaks of the writ being directed not to the petitioner but to the custodian: "Said writ shall be directed to the person in whose custody the party is detained . . ."[4] The reach of that process is what

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1867. Cong. Globe, 39th Cong., 2d Sess. 730 and 790. The House then agreed to the amendment. Cong. Globe, 39th Cong. 2d Sess. 899. The entire bill as presented to the Senate is set out at Cong. Globe, 39th Cong., 2d Sess. 730. The bill was a result of a House resolution instructing the judiciary committee to propose enabling legislation for United States courts to enforce the freedom of wives and children of United States soldiers and the liberty of all persons. Cong. Globe, 39th Cong., 1st Sess. 4151. Such freedom had been guaranteed soldiers for their families as an inducement to enlist. For a thorough examination of the history of the statute *see* Fairman, *New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587 at 631-643 (1949).

[4] H.R. 605, 39th Cong., 1st Sess. (1866); Act of Feb. 5, 1867, 14 Stat. 385.

was then discussed in the Senate by Senator Revedy Johnson. Cong. Globe, 39th Cong., 2d Sess. 730 (1867). He spoke of his agreement with the late Chief Justice Taney's view that "this kind of process issued by any judge of the Supreme Court of the United States could be sent anywhere within the limits of the United States, and would of course be compulsory upon the party to whom it was directed," but pointed out that Chief Justice Chase had very recently expressed the contrary view, that Supreme Court justices would issue writs only to custodians in their own circuits.[5]

Senator Johnson saw a problem in that he interpreted the bill as permitting a district judge in a district having no connection with *either* the petitioner or his custodian to bring before him prisoners "convicted and sentenced and held" in distant states, contrary to Chief Justice Chase's feelings. The bill was put over for the next day by Senator Trumbull. Cong. Globe, 39th Cong. 2d Sess. 790.

On January 28 when the bill was taken up again, Senator Trumbull proposed amending the bill by adding the phrase "within their respective jurisdictions." He noted however that he thought the language redundant as he did not think the bill susceptible to the construction

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[5] Senator Johnson's interest in the inquiry is detailed in Fairman, *New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587 at 637-38 (1949). Five weeks before his remarks on the Senate floor, Senator Johnson had made application before Chief Justice Chase for a writ of habeas corpus on behalf of Dr. Samuel A. Mudd, one of Booth's accomplices in the assassination of President Lincoln. New York Herald, Dec. 20, 1866. States Fairman: "No report of Chase's opinion has been found; but he denied the petition, and it was Johnson's understanding that this was on the view that a Justice had no power to issue the writ to be executed outside the circuit to which he was assigned." Id. at 638.

suggested by Senator Johnson. Just before the amended bill passed, Senator Johnson explained again that he had suggested amendment because he had been concerned with the extent of the reach of process of the judges, particularly with where the custodian to whom the writ should be directed was located:

> I suggested the necessity of an amendment the other day because I know that the late Chief Justice of the United States decided that under the laws as they stand process issued by a judge of the Supreme Court in cases where these judges have a right to issue process extends all over the Union. That I am satisfied might lead to a practical evil. The amendment proposed by the honorable chairman is entirely satisfactory to me and removes that difficulty. Cong. Globe, 39th Cong., 2d Sess. 790.

The amended bill was then sent to the House where it passed with only one comment:

> Mr. Wright: I would ask whether anybody in this House, when he gives his vote on these amendments, knows what he is voting upon? [Laughter.] Cong. Globe, 39th Cong., 2d Sess. 899.

Thus, the legislative history bespeaks a concern with the efficacy of the writ once issued, measured in terms of properly reaching the custodian against whom complaint is made. Requiring the presence of the petitioner within the territorial limits of the court issuing the writ was and is unnecessary to cure any potential for jurisdictional abuse. The legislative history is not only *as supportive* of the view that it was the custodian's presence which was thought critical, but, as Professor Fairman's post-*Ahrens* scholarship demonstrates, it was in historical fact *that presence*, of the custodian to whom the writ is directed,

which was thought necessary to prevent an overreach of process.

The weight of extra-legislative history gives additional support to the conclusion that the Congress in 1866-67 was concerned with the location of the respondent to whom the writ would be directed rather than the location of the petitioner. Although the majority opinion in *Ahrens* concluded that the accepted view in 1867 was that the prisoner must be within the territorial limits of the court, relying on three cases discussed below,[6] Petitioner respectfully submits that this historical conclusion is incorrect and that it is unsupported by the case authority.

It is at least noteworthy that the *Ahrens* Court could rely on none of its own cases in its historical analysis. To the contrary, *Ex parte Endo*, 323 U.S. 283 (1944), decided by the Court only four years earlier, had indicated that the ability of the court to reach the custodian by process was the important issue,[7] although

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[6] *Ahrens v. Clark*, 335 U.S. at 191-192 citing *Ex parte Graham*, 4 Wash. C. C. 211, 10 F. Cas. 911 (No. 5,657) (C.C.E.D. Pa. 1818); *In re Bickley*, 3 F. Cas. 332 (No. 1,387) (S.D.N.Y. 1865); and cf. *United States v. Davis*, 5 Cranch C. C. 622, 25 F. Cas. 775 (No. 14,926) (D.C. Cir. 1839).

[7] *Endo* quoted in part with approval *In the Matter of Samuel W. Jackson*, 15 Mich. 416, 439-440 (1867) (Cooley, J.) in 323 U.S. at 306:

> The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent . . .

the precise point decided in *Ahrens* had been reserved. *Endo* involved a petitioner removed from the district after filing; the respondent was within the district. The Court in *Endo* concluded that "the court may act if there is a respondent within reach of its process who has custody of the petitioner." 323 U.S. at 306. The Court held that the objective of granting a writ of habeas corpus to inquire into a restraint of liberty would be served "if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun." 323 U.S. at 307.

In *Jackson* the court unanimously held that the writ would not issue since respondent no longer had control of the prisoner, a minor child taken to Canada. The court was evenly split on whether the prisoner's absence also would have precluded relief. Contemporaneously with the 1867 Congressional action enacting the habeas corpus statute with the disputed phrase, Judge Cooley in *Jackson* came to the conclusion that the law at that time was that a writ of habeas corpus can be granted if one who has control of the prisoner is within the jurisdiction, no matter where the prisoner is held:

> I think the case presented by the petition is one in which we can give relief, and the decision in *United States v. Davis*, 5 Cranch C.C. 622, is in point, and will warrant it. There are no conflicting decisions. The incidental remarks which have been made in some cases about the remedy applying where the imprisonment is within the state, seem to me of no significance. In none of those cases was attention directed to this particular point, and I have already indicated my opinion that imprisonment, within the meaning of the law, may be held to be wherever the person is who imprisons. This writ is based upon no technical reasons, but its scope is as broad as its power to give redress. *In the Matter of Samuel W. Jackson*, 15 Mich. 416, 440 (1867) (Cooley, J.).

The three cases predating the statute that were cited by the Court in *Ahrens* to support the historical view that the petitioner must be within the territorial jurisdiction are, upon analysis, scant authority for that proposition. *Ex parte Graham*, 4 Wash. C.C. 211, 10 F. Cas. 911 (No. 5,657) (C.C.E.D. Pa. 1818), was quoted by the Court at 335 U.S. 191 n. 2. *Graham* was a habeas corpus action in which the jurisdiction of the court to issue that writ was not questioned; the *Graham* quote relied upon in the *Ahrens* opinion actually speaks to a deficiency in the arrest warrant rather than in the writ of habeas corpus. The issue in *Graham*, one of the Prize cases, was the reach of process issued by Chief Justice Marshall instructing federal marshals in several districts to take Graham or his property into custody. *Graham* involved interpretation of specific statutory authority granted in the Prize cases and discussed the reach of process in what was really a civil suit, not the Great Writ. *Graham* gives no historical authority to the proposition for which it was cited in *Ahrens*.

United States v. Davis, 5 Cranch C.C. 622, 25 F. Cas. 775 (No. 14,926) (D.C. Cir. 1839), stands as authority for the proposition that only the location of the respondent is dispositive. Indeed, *Davis* was relied upon as authority by Judge Cooley in *In the Matter of Samual W. Jackson*, 15 Mich. 416, 440 (1867), a leading expression of the proposition opposite to that for which *Davis* was cited in *Ahrens*. *Davis* involved a habeas corpus petition brought in behalf of three Negroes in the custody of respondent Davis. Davis' return to the writ was that the petitioners had been removed from the district before the writ had issued. The court held that it was sufficient that Davis was present and capable of producing the prisoners.

In re Bickley, 2 F. Cas. 332 (No. 1,387) (S.D.N.Y. 1865), is the only case lending some support to the *Ahrens* majority position. Even there, however, the basis of the decision is unclear. The basis may have been that the respondent was not proper, partly because he was a high-ranking military commander and the action was brought in the midst of the Civil War. Bickley was a civilian held in Boston in a military prison. He named General Dix as his custodian. Dix, who was in New York where the action was filed, was the general commandant of the entire area, but not the keeper of the prison where Bickley was held. The court in *Bickley* felt that its process could not operate in Massachusetts to open the prison doors there, indicating that perhaps Dix was the wrong respondent. The court was also extremely reluctant to assume any authority over General Dix and did not want to order him to travel about the country in time of war. *Bickley* is weak authority for the historical conclusion of the majority in *Ahrens*.

The summary of precedent extending to the time of the decision in 1948 given in the *Ahrens* opinion, 335 U.S. at 190, is also unconvincing. Seven lower court cases were said to speak for the *Ahrens* rule. Five of the seven were cases in which both the prisoner and custodian were outside the territorial jurisdiction of the court, and the two remaining cases[8] can be distinguished at least on the ground that their bases for decision are unclear, if not on the facts. *See Ahrens v. Clark*, 335 U.S. at 203 (Rutledge, J., dissenting). Mr. Justice Rutledge also cited lower court

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[8] *McGowan v. Moody*, 22 App. D.C. 148 (1903), and *In re Bickley*, 3 F. Cas. 332 (No. 1,387) (S.D.N.Y. 1865). *Bickley* is discussed *supra*. *McGowan* also involved a prisoner in military custody and the ground of the decision seems to be that the respondent, Secretary of the Navy, was not the proper custodian.

cases counter to the conclusion reached in *Ahrens*. 188 U.S. at 203 n. 17, 18.

Most commentators inquiring into the history of the matter have concluded that the generally accepted common law view is that it is enough for the custodian to be in the district. *See D. Meador, Habeas Corpus and Magna Carta* 42 (1966); Comment, *Habeas Corpus—Jurisdiction of Federal Courts to Review Jurisdiction of Military Tribunals when the Prisoner Is Physically Confined Outside the United States*, 49 Mich. L. Rev. 870, 871 (1951); *R. Sokol, Federal Habeas Corpus*, 87-88 (2d ed. 1969); and *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1162 (1970).

Legislative history since *Ahrens* bespeaks neither approval nor disapproval of the *Ahrens* rule. The most recent amendments to the habeas statute came in 1966, before decision in *Peyton v. Rowe*, 391 U.S. 54 (1968), and *Smith v. Hooey*, 393 U.S. 374 (1969), the holdings of which multiplied the likelihood that a habeas petitioner would find himself located in a district different than that of the respondent against whom he should most logically complain.[9] It is not surprising, therefore, that the legislative history of the 1966 amendments speaks to quite different congressional concerns. The essential 1966 statutory change was the addition of section (d) to 28 U.S.C. §2241 permitting a state prisoner to bring a habeas action challenging the state sentence he is serving either in the district of his

[9] The logic and policy bearing on the question of the district most suitable to entertain a habeas petition under the particular circumstances (given requisite "custodial presence" in more than one district, see e.g. *Strait v. Laird*, ___ U.S. ___, 32 L. Ed. 2d 141 (1972)) will be discussed below.

confinement or in the district of the sentencing court.[10] This amendment was passed for two main reasons: (1) because an increasing number of applications for the writ were being filed which were flooding district courts where state prisoners were located and (2) because a greater proportion of cases required evidentiary hearings and the sentencing district was felt to be the more convenient location for conducting full and fair hearings. *See* H.R. Rep. No. 1894, 89th Cong., 2d Sess. 1-2 (1966) and S. Rep. No. 1502, 89th Cong., 2d Sess. 2 (1966) reporting favorably on identical legislation. Both reports explained that "recent Supreme Court decisions" changing the nature of habeas corpus action had caused the problem and the House Report cited specifically *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1962); and *Fay v. Noia*, 372 U.S. 391 (1963). H.R. Rep. No. 1894, 89th Cong., 2d Sess. 2 (1965); S. Rep. No. 1502, 89th Cong., 2d Sess. 2 (1966). These cases were also cited in the memorandum from the United States Committee on the Judiciary that was incorporated into each report. Additionally the

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[10] 28 U.S.C. § 2241(d) provides:

> Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

purpose section of each report refers to the amendment as dealing with habeas petitions from applicants "in custody under judgments and sentences of state courts." Thus this latest amendment dealt with one narrow class of petitioner only--those in state custody challenging the constitutional validity of their present sentences.

Petitioner and other petitioners similarly situated in either state or federal custody challenging convictions or indictments other than those they are presently serving were certainly not contemplated by the legislators amending §2241 in 1966; nor could they have been, as above stated, since only in 1968 when the Court decided *Peyton v. Rowe*, 391 U.S. 54 (1968), was the posture of Petitioner's case possible. However, the intention of the legislature was clearly to allow habeas corpus petitions to be entertained in the district where the records and witnesses are found and to leave venue flexible as justice and particular circumstances might require. In this respect, at the very least, *Ahrens* was disfavored and repudiated for one class of state habeas petitioner.

Recent constitutional history pertaining to related questions of habeas corpus jurisdiction accentuates the limits placed on the Writ by *Ahrens*. The circumstances in which the Great Writ is available have been expanded considerably since 1867, since 1948 when *Ahrens* was decided, and especially since 1966 when the latest amendments to 28 U.S.C. §2241 were enacted. In 1867 and for many years thereafter the writ of habeas corpus was used mainly to challenge the jurisdiction of the trial court. *See Moore v. Dempsey*, 261 U.S. 86 (1923), and *Johnson v. Zerbst*, 304 U.S. 458 (1939). Now the efficacy of the writ has been protected by an expansion of the range of constitutional inquiry. Not only are trial procedures scrutinized, but immediate release is not the

only relief available as was previously the case under *McNally v. Hill*, 293 U.S. 131 (1934). State prisoners now have a recognized right to a speedy trial and may challenge its denial; they are neither blocked by a prematurity rule in challenging its denial nor by the fact that they are serving a sentence in another jurisdiction. *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Peyton v. Rowe*, 391 U.S. 54 (1968); *Smith v. Hooey*, 393 U.S. 374 (1969).

It was not until the Court decided *Klopfer v. North Carolina*, 386 U.S. 213 (1967) that the right to a speedy trial on a state charge was held to be guaranteed by the Sixth and Fourteenth Amendments. The Court held that the "right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment," 386 U.S. at 223. In *Klopfer* the petitioner had complained that an outstanding indictment caused him present anxiety though he was not in custody, and the Court agreed. The speedy trial guarantee was held to encompass the right to pursue affirmative relief from outstanding untried state charges.

Soon after deciding *Klopfer*, this Court held that a state has a duty to attempt to bring an indictee to trial, even if he is serving a prison sentence imposed by another jurisdiction. *Smith v. Hooey*, 393 U.S. 374 (1969). The Court recognized that the protections afforded the basic demands of our criminal justice system by the guarantee of a speedy trial "are both aggravated and compounded in the case of an accused who is imprisoned in another jurisdiction," and compared the effects of a delay in bringing a prisoner to trial to the oppression suffered by a defendant held without bail on an untried charge. 393 U.S. at 378. The Court carefully detailed the deleterious effects of an outstanding untried charge and detainer on a

prisoner. The Court also recognized the increasing cooperation among the states themselves and between the state and federal government and disapproved the Texas court's having allowed "doctrinaire concepts of 'power' and 'authority' to submerge the practical demands of the constitutional right to a speedy trial." 393 U.S. at 381.

Although *Smith v. Hooey, supra*, involved a federal prisoner seeking trial on an untried state charge, the Court in its analysis of the effects on the prisoner, the duty of the state, and the cooperation among the states, made no differentiation between federal prisoners and state prisoners seeking such relief. Indeed, there is no reason for treating the two classes differently; and *Smith v. Hooey* can be said to have imposed a duty on state authorities to attempt to bring all accused prisoners to trial, no matter where they are incarcerated.

Prior to 1968, habeas corpus petitioners seeking a speedy trial would have been blocked by the prematurity rule of *McNally v. Hill*, 293 U.S. 131 (1934). But shortly prior to its 1969 decision in *Smith v. Hooey*, the Court in *Peyton v. Rowe*, 391 U.S. 54 (1968), extended to habeas petitioners the right to challenge future restraints, thereby expressly overruling *McNally*. In so doing, habeas corpus was extended by definition to petitioners complaining of restraint imposed by custodians not actually maintaining physical custody at the time relief is sought. The *Peyton* Court noted in 391 U.S. at 59 that 28 U.S.C. §2241 does not attempt to define the words "in custody" and concluded that the words should be given broad meaning. Similarly, Petitioner argues that the statute does not itself define the companion language "within their respective jurisdictions"; those words also should be given broad meaning "consistent with the

canon of construction that remedial statutes should be liberally construed." *See Peyton v. Rowe*, 391 U.S. at 65.

Peyton v. Rowe and *Smith v. Hooey* are only recent examples of movement away from doctrinaire jurisdictional analysis. *Jones v. Cunningham*, 371 U.S. 236 (1962), freed the writ from outdated notions regarding the amount of custody required for jurisdictional purposes when it permitted habeas corpus relief to a petitioner who had been paroled. Further, *Jones* reaffirmed *Ex parte Endo*, 323 U.S. 283, 304 (1944), in holding that jurisdiction was not lost when petitioner was removed from the district (North Carolina had paroled Jones to Georgia) after filing his petition . The *Jones* Court reiterated the *Endo* view that it is the court's ability to reach the respondent, to whom the writ flows, that is essential and not the location of petitioner. The Court in earlier cases did not allow the absence of Petitioner from all federal districts to preclude jurisdiction in habeas corpus actions, the wording of the statute notwithstanding. *Hirota v. MacArthur*, 338 U.S. 197 (1948); *United States ex rel Toth v. Quarles*, 350 U.S. 11 (1955); *Burns v. Wilson*, 346 U.S. 137 (1953). The most recent example of an abjuration of a rigid construction of the jurisdictional requirement of "custody" is *Strait v. Laird*, ___ U.S. ___, 32 L.Ed.2d 141 (1972) a case in which this Court refused "to exalt fiction over reality" in the identification of sufficient custodial presence in the forum state there chosen.

Ahrens stands in sharp contrast to the many decisions which lower, rather than raise, rigid jurisdictional barriers by force of statutory construction. The decision would stand as a mere anomaly were it not for its effect on decisions extending available modes of relief and

construing requisite "custody." Such decisions necessarily contemplate circumstances in which a habeas petitioner will be confined in a judicial district other than that which territorially embraces the "real respondent in interest" against whom he is complaining.

Different than the Congress, the lower federal courts have had numerous opportunities subsequent to *Peyton v. Rowe* to ponder the continuing vitality of the *Ahrens* rule. Although the circuit courts of appeals are badly split on the issue,[11] many of the opinions share a common attribute: an expression of disagreement with the effect of the rule and a desire for an authoritative resolution of the jurisdictional confusion. *See, e.g., White v. Tennessee*, 447 F.2d 1354 (6th Cir. 1971) and *United States ex rel. Fisher v. Pennsylvania*, 314 F. Supp. 1329 (E.D. Pa. 1970). In this respect the judges join the commentators. *See e.g.*, Tuttle, *Catch 2254: Federal Jurisdiction and Interstate Detainers*, 32 U. Pitt. L. Rev. 489 (1971); Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 Crim. L. Bull. 753 (1971); Comment, *Towards a Solution of the Jurisdictional Problem in Multi-state Federal Habeas Corpus Actions Challenging Future Restraints*, 1970 Utah L. Rev. 625; and Comment, *The Custody Requirement and Territorial Jurisdiction in Federal*

[11] See addendum to Braden's Petition for a Writ of Certiorari, filed April 15, 1972, for a catalog of circuit positions. Some courts feel that both the district of detention and the district lodging the detainer have jurisdiction but the district lodging the detainer is strongly preferred (e.g. *Word v. North Carolina*, 406 F.2d 352 (4th Cir. 1969)); others hold that the district lodging the detainer has no jurisdiction because of *Ahrens* (e.g., *White v. Tennessee*, 447 F.2d 1354 (6th Cir. 1971)); others have found that the district lodging the detainer is the only proper one (e.g., *Rodgers v. Louisiana*, 418 F.2d 237 (5th Cir. 1969)).

Habeas Corpus, 118 U. Pa. L. Rev. 429 (1970). Wexler & Hershey suggest that when *Ahrens* is used to deny access to the writ to a petitioner otherwise validly seeking habeas relief, it could be interpreted as a suspension of the writ of habeas corpus, as prohibited by the Constitution. 7 Crim. L. Bull. at 774-775 n. 109. *See also, Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1263 (1970). Others have criticized *Ahrens* itself for its overly restrictive views of jurisdiction. *See R. Sokol, Federal Habeas Corpus*, 85-88 (2d ed. 1969) and Fairman, *New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587, 632 (1949).

Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969) (en banc), is one of the leading cases which articulates the view that *Ahrens* does not require strict application of the "territorial jurisdiction" rule in cases in which an out-of-state detainer is under attack. In *Word*, the United States Court of Appeals for the Fourth Circuit affirmed a district court decision that Virginia prisoners who were also convicted of offenses in North Carolina (which state had lodged detainers with Virginia prison officials) should seek habeas corpus relief in a North Carolina federal district court and not a Virginia federal district court. The court reasoned that since North Carolina was the "custodian" for purposes of the detainer, North Carolina was the proper place to bring the action. The court was persuaded that, in spite of the fact that the detainer was filed in Virginia and that the prisoner was confined there, the merits raised by the petitioner went to the validity of a North Carolina judgment. The records and witnesses of both parties were in North Carolina and North Carolina's Attorney General had to defend his state's action. Since Virginia was unconcerned with the outcome of the case

while North Carolina had much at stake, the Fourth Circuit felt compelled to look beyond immediate physical custody. In reaching its result the *Word* court concluded at 359:

> ... if the words "within their respective jurisdictions" in §2241 mean anything more than that the court may act only if it has personal jurisdiction of the proper custodian and capacity, within its geographic boundaries, to enforce its orders, physical presence of the petitioner within the district is not an invariable jurisdictional prerequisite. It gives way in the face of other considerations of fairness and strong convenience.

The same court reached the conclusion that a prisoner seeking a speedy trial in another state can petition for relief in the district where the trial is sought. *Kane v. Virginia*, 419 F.2d 1369 (4th Cir. 1970).

Another leading case which follows the *Word* rationale is *United States ex rel. Meadows v. State of New York*, 426 F.2d 1176 (2d Cir. 1970), in which the United States Court of Appeals for the Second Circuit affirmed a district court decision holding that the proper court in which a Georgia prisoner should seek relief from a New York detainer was New York. The court distinguished *Ahrens* by stating at 1181:

> Therefore, despite the general language of the opinion, the precise holding of *Ahrens* applies only to the jurisdiction of the district courts in habeas corpus proceedings commenced by petitioners seeking immediate release from confinement.

The *Meadows* court refused "to extend *Ahrens* to a class of habeas corpus petitioners who did not exist at the time

the Supreme Court decided *Ahrens*, petitioners who demand not an immediate release from physical confinement but the withdrawal of a potential restraint on future liberty." 426 F.2d 1176 at 1182.

It is instructive to consult the *Ahrens* dissent of Justice Rutledge and compare *Meadows* as a measure of the extent to which this new class of petitioners necessitates a rethinking of forum appropriateness. Although formulating a rule that would permit a petitioner to petition outside the district in which he is confined, Justice Rutledge cautioned that "their absence from the district is a circumstance which normally would induce the court to exercise its discretion to decline jurisdiction, but which may be disregarded in exceptional circumstances . . ." 335 U.S. at 202. *Meadows* also contemplates jurisdiction lying in more than one district, but from its post-*Peyton v. Rowe* vantage the court could delineate a variety of now unexceptional circumstances in which the place of confinement is the least appropriate forum, particularly when the challenge is to a future restraint. No better example of these circumstances need be contrived than the case at bar. It is Kentucky, where Petitioner filed his habeas petition, in which the subject indictment is outstanding and from which a detainer has issued. Accordingly, the district court below, before whom Petitioner prevailed, found jurisdiction to be appropriate "[s]ince it is the State of Kentucky which must take action" (App. 9). It is Kentucky officials, not the Alabama prison warden, who have the real interest in Petitioner's claims and who will surely defend on the merits of Petitioner's claims, no matter where brought. Moreover, transportation of the prisoner or other witnesses from outside the chosen forum state is demonstrably not a factor here; Petitioner presents a

claim which, not untypically, can be—and was—decided as a matter of law on the Kentucky (not Alabama) files and records without an evidentiary hearing. In addition, it is Kentucky's remedies that Petitioner must exhaust under 28 U.S.C. §2254 since he complains of the Kentucky indictment only. It is in Kentucky that he must demand the speedy trial, as he did here. Such demands must conform to local procedure, for there is no standard demand procedure; and the way is more often perplexing than clear. *See* Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 Crim. L. Bull. 753, 760-762 (1971). This problem is acute since the Court has not enunciated with particularity what a petitioner must do to satisfy the demand requirements. Certainly a local district court judge is better equipped to decide whether sufficient and correct demand has been made to the proper parties than a judge in a foreign state where petitioner happens to be incarcerated.

All of these factors—the nature of the issue presented, the proof to be adduced, the respective evidentiary burden to be borne by each party (if any), the relief sought, the place of exhaustion of remedies, the interest of the named respondent—should properly weigh in the choice of forum. Petitioner has shown above that the legislative history of the statute reflects concern over issuance of process by an appropriate court to an appropriate respondent. The analysis here urged supports rather than derogates from that important concern, a concern of more than modest proportion in our federal system. Given the contemporary range of inquiry under the writ, the turnkey at hand may be the least appropriate respondent against whom the writ should issue, and the district court which territorially embraces the jailhouse may be the least appropriate court to exercise the vast power implicit in the writ.

Petitioner hastens to add that he does not thereby argue that the district of confinement is *per force* without concurrent jurisdiction. *Strait v. Laird*, ___ U.S. ___, 32 L.Ed.2d 141 (1972) teaches that there may be sufficient custodial presence in more than one district upon which jurisdiction may be predicated and against which process may be issued. Circuit courts addressing themselves to the question have concluded that each such district could exercise jurisdiction, *see United States ex rel. Meadows v. State of New York*, 426 F.2d 1176, 1183 n. 8 (2d Cir. 1970), *Word v. North Carolina*, 406 F.2d 352, 357 n. 6 (4th Cir. 1969), subject to the important qualifications inherent in familiar convenience of forum standards.

United States ex rel. Meadows, supra, develops at length the appropriateness of utilizing 28 U.S.C. §1404(a) to effect needed transfer. 406 F.2d at 1183, n. 9. The *Meadows* court concluded that since habeas corpus proceedings are civil in nature, they are subsumed under the phrase "any civil action" of 28 U.S.C. §1404(a), citing *Webb v. Beto*, 362 F.2d 105 (5th Cir. 1966), *cert. denied*, 385 U.S. 940 (1966). On the facts of *Meadows* the court found that the petition "might have been brought" in either a Georgia or New York district court. Similarly, Petitioner here argues that although he "might have brought" his petition in either an Alabama or Kentucky district court, he should nonetheless not be denied his forum choice given its appropriateness by the measure of 28 U.S.C. §1404(a), "for the convenience of parties and witnesses and in the interest of justice", nor should the district court be reversed in either its jurisdictional decision or its judgment on the merits. In sum, the district court below engaged in a valid exercise of its statutory discretion in a case in which a proper

party respondent was before it under convenient circumstances serving the interest of justice. Neither 28 U.S.C. §2241 nor 28 U.S.C. §1404(a) require more; nor should a rigid application of *Ahrens v. Clark* deny petitioner his already abundantly constrained jurisdictional choice. Such a holding would work an invariable restriction which, in its myriad applications, would seriously hinder the efficient administration of a burgeoning habeas corpus case-load and serve neither petitioners, respondents, trial judges, nor the interest of justice. Neither the language, the history, nor the purpose of the habeas statute require such a result.

CONCLUSION

Petitioner asks that the decision of the United States Court of Appeals for the Sixth Circuit be reversed and that the case be remanded with instructions to enter judgment upon the opinion and order of the United States District Court for the Western District of Kentucky made and entered on February 26, 1971.

Respectfully submitted,

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*Attorney for Petitioner gratefully acknowledges the assistance of Marilyn Miller Mosier, a graduate of Wayne State University Law School.

CERTIFICATE OF SERVICE

I hereby certify that on this day of , 1972, three copies of the Brief for Petitioner were mailed, air mail postage prepaid, to John M. Famularo, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent. I further certify that all parties required to be served have been served.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6516

CHARLES D. BRADEN,

Petitioner,

—v.—

THIRTIETH JUDICIAL CIRCUIT COURT OF THE COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Civil Liberties Union respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amicus curiae. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has refused to consent. Both letters have been filed with the Clerk of the Court.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 180,000 members solely dedicated to defending the liberties guaranteed by the Bill of Rights. In its 52-year existence, it has been particularly concerned that procedural remedies, especially one so fundamental as the Great Writ, be fully available to rectify the denial of civil liberties.

In accord with that concern, we filed an amicus curiae brief in *Schlanger* v. *Seamans*, 401 U.S. 487 (1971) and represented the petitioner in *Strait* v. *Laird*, 32 L. Ed.2d 141 (1972), both of which involved the availability of habeas corpus relief to members of the armed services seeking release from military custody.

In this case the high office of the Writ is invoked to secure another fundamental liberty—the right to a speedy trial. The decision below purports to deny the petitioner any forum to vindicate his speedy trial right. The effect of the decision is a constitutionally prohibited suspension of the Writ.

The purpose of this brief is to suggest that the decision below is inconsistent with both the modern reach of the habeas corpus remedy and this Court's concern to make the writ available to new classes of petitioners like the one here.

Respectfully submitted,

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IN THE

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The interest of the American Civil Liberties Union is set forth in the preceding motion for leave to file this brief.

Statement of the Case

In June 1967, a Kentucky state grand jury returned a two count indictment against petitioner, charging him with store-house breaking and safe-breaking. In November, 1967, he escaped from the custody of Kentucky authorities and was subsequently arrested in Alabama on felony charges pending in that state. Kentucky then lodged a

detainer against petitioner while he was awaiting trial on the Alabama charges. In February, 1969, while still in custoday in Alabama, petitioner filed a demand for trial on the Kentucky indictment. Kentucky officials, despite this Court's decision in *Smith* v. *Hooey*, 393 U.S. 374 (1969), refused to secure petitioner for trial. Thereafter, petitioner was convicted of the Alabama charge and received a five year sentence which he is presently serving. His attempts to secure a trial on the Kentucky charges, by motions in the Kentucky courts, proved unsuccessful.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Kentucky, pursuant to 28 U.S.C. Sections 2241 and 2254. He alleged that his constitutional right to a speedy trial was being violated because of the refusal of the Kentucky authorities to secure his return from Alabama for trial on the Kentucky indictment. The district court, finding that the Kentucky state authorities were under an affirmative obligation to secure Braden for trial, gave them sixty days to do so or suffer dismissal of the charges. On appeal, the Sixth Circuit reversed, holding that the federal district court in Kentucky lacked jurisdiction to hear the habeas corpus proceedings.

ARGUMENT

Prisoners confined within one federal district, who seek to challenge the constitutional validity of detainers lodged by public officials located in another district, may seek federal habeas corpus relief in either district.

Introduction

The issues in this case and the dilemma they embody are the product of the doctrinal tension between *Ahrens* v. *Clark*, 335 U.S. 188 (1948) and subsequent decisions of this Court, particularly *Peyton* v. *Rowe*, 391 U.S. 54 (1968), which have expanded the reach and availability of habeas corpus. The practical consequence is that this petitioner falls between two jurisdictional stools. He apparently cannot assert his speedy trial claim in either the district where he is confined (Alabama) or the district where he has been charged (Kentucky).

Amicus submits that *Ahrens* does not necessarily require such a result; but if it is thought to compel that result, it must be overruled. Whether or not it was properly decided at the time, see *Developments—Federal Habeas Corpus*, 83 Harv. L. Rev. 1042, 1160-65 (1970), it has been by-passed by the thrust of more recent decisions. Those decisions require that petitioners such as the one here be entitled to challenge the validity of detainers in either the district of confinement or the district from which the detainer issued.

A. The petitioner must be afforded some federal forum in which to raise his claim.

The petitioner Braden comes to this Court in a unique position. Ultimately, he must prevail; for in the end, he must be afforded *some* federal district court in which to

present his constitutional challenge to the pending state court prosecution and the detainer lodged against him. The Constitution will permit no less. Article I, Section 9; *Ex Parte Bollman*, 4 Cranch 75 (U.S. 1807); *Ex Parte Milligan*, 4 Wall. 2, 18 L.Ed. 281 (1866); *Ex Parte Merryman*, Fed. Case No. 9487 (1861). The decision below, in appearing to sanction less,[1] represents a retreat from the

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[1] The court below assumed that its decision might "result in Braden's inability to find a forum in which to assert his constitutional right to a speedy trial . . . because the rule in the Fifth Circuit, where [petitioner] is incarcerated appears to be that a district court in the state that has filed the detainer is the proper forum in which to file the petition." 454 F.2d at 146. See generally, Tuttle, *Catch 2254: Federal Jurisdiction and Interstate Detainers*, 32 U. Pitt. L. Rev. 489 (1971). As we have suggested, such a result would be patently unconstitutional, calling into question the validity of Section 2241 as applied.

But the dilemma is avoidable, *cf. Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring), for none of the Fifth Circuit cases cited below necessarily compel a result which creates a forumless petitioner. In *May* v. *Georgia*, 409 F.2d 203 (5th Cir. 1969) the court merely held that it could not determine from the record whether the petitioner's demand on the state which had issued the detainer was sufficiently explicit so that it could be construed to constitute a request for trial under *Smith* v. *Hooey*, 393 U.S. 374 (1969), noting that if a sufficient demand had been made then the district from which the detainer issued could grant the writ. 409 F.2d at 204-05. The court also suggested that a proceeding could be brought in the district of confinement. Similarly, the per curiam decision in *Rodgers* v. *Louisiana*, 418 F.2d 237 (1969) did not involve a detainer issue or an effort to seek a speedy trial on a pending charge. Rather, the petitioner sought to attack directly, while imprisoned in Texas, seven unserved sentences imposed by Louisiana courts. And, insofar as the mere existence of the unserved Louisiana sentences did create some current disability, the Fifth Circuit's ruling is inconsistent with *Strait* v. *Laird*, 32 L.Ed.2d 141 (1972). Finally, *Flanagan* v. *Arizona*, 313 F. Supp. 664 (S.D. Tex. 1970), supports the right to file in the district of confinement. There, the federal court in that district permitted the petition to be filed but then transferred it, for reasons of comity, to the federal district court encompassing the state from which the detainer emanated. Implicit in such a

increasingly liberal interpretation of the jurisdictional reach of the Great Writ. See, e.g., *Peyton* v. *Rowe*, 391 U.S. 54 (1968); *Smith* v. *Hooey*, 393 U.S. 374 (1969); *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *Jones* v. *Cunningham*, 371 U.S. 236 (1962); *Strait* v. *Laird*, 32 L.Ed. 2d 141 (1972); *Kane* v. *Virginia*, 419 F.2d 1269 (4th Cir. 1970); see also, *Bishop* v. *Medical Superintendent*, 377 F.2d 467 (6th Cir. 1967); *Smith* v. *Campbell*, 450 F.2d 829 (9th Cir. 1971). It ignores this Court's repeated teaching that habeas corpus, which is "both the symbol and guardian of individual liberty," *Peyton* v. *Rowe*, *supra*, 391 U.S. at 58, "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones* v. *Cunningham*, *supra*, 371 U.S. at 243. Neither this Court's decision in *Ahrens* v. *Clark*, *supra*, nor the legislative history underlying the habeas corpus statute, nor the policy considerations in administering federal habeas corpus require the result reached below.

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transfer is the assumption that the action was properly brought in the district of confinement in the first instance. 28 U.S.C. Section 1404(a); See *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

In any event, the primary issue before this Court is not whether petitioners with outstanding detainers have an additional forum in the district of confinement, see *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176, 1183 n. 8 (2nd Cir. 1970); *Word* v. *North Carolina*, 406 F.2d 352, 364-366 (4th Cir. 1969) (Sobeloff, J. concurring); although we submit they do, see pp. 14-16, *infra*. Rather, the question is whether there is a forum in the district out of which the detainer was isued, and, if so, whether petitioner's choice of forums is to be respected. Questions of judicial comity and convenience may be resolved through the venue mechanisms of 28 U.S.C. Section 1404(a). Cf. *Smith* v. *Campbell*, 450 F.2d 829, 834 (9th Cir. 1971).

B. *The ruling below is not compelled by the decision in Ahrens v. Clark, 335 U.S. 188 (1948) nor by the history or policies underlying the federal habeas corpus statutes.*

In *Ahrens* v. *Clark*, the Court was called upon to consider the question of whether the "within their respective jurisdictions" provision of the predecessor statute to 28 U.S.C. Section 2241 required, as a matter of threshold jurisdiction, the physical presence of the petitioner within the geographical boundaries of the district court in which the petition for the writ was filed. The petitioners in *Ahrens* were 120 German aliens confined at Ellis Island, New York, awaiting deportation as threats to the national security. Seeking immediate release, they filed a habeas corpus petition in the United States District Court for the District of Columbia, naming as respondent the Attorney General, under whose order they were being deported.

In affirming the lower courts' dismissal of the petition, Justice Douglas, writing for the majority, held that

> . . . the jurisdiction of the District Court to issue the writ in cases such as this is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the Court . . . 335 U.S. at 192 (footnote omitted).

In reaching that result, this Court relied heavily on its reading of the history of the statute and the practical difficulties perceived as consequences of a contrary decision: ". . . it would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections perhaps thousands of miles from the District Court that issued the writ." 335 U.S. at 191. And even while defering to such policy considerations, the ma-

jority opinion specifically noted that "in some situations return of the prisoner to the court where he was tried and convicted might seem to offer some advantages." 335 U.S. at 191.

When viewed from the proper historical context, this caveat becomes quite significant. At the time *Ahrens* was decided, habeas corpus could only be utilized to secure immediate release from confinement. *McNally* v. *Hill*, 293 U.S. 131 (1934). The availability of habeas corpus relief to secure more than that was not recognized until 15 years after *Ahrens*, when this Court held that the habeas corpus remedy could be used to test a conviction while the petitioner was on parole. *Jones* v. *Cunningham*, *supra*. And it was five years after that before the Court held that habeas corpus would lie to challenge a conviction after the sentence was completely served, *Carafas* v. *LaVallee*, 391 U.S. 234 (1968) or before it had even commenced, *Peyton* v. *Rowe*, *supra* (overruling *McNally* v. *Hill*, *supra*). Thus, while *Ahrens* purported to speak in broad terms, at its farthest reach, it "applies only to the jurisdiction of the district courts in habeas corpus proceedings commenced by petitioners seeking immediate release from confinement." *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176, 1181 (2nd Cir. 1970).

Accordingly, the rationale of *Ahrens* has only minimal relevance to the new class of petitioners created by the combination of *Peyton* v. *Rowe*, *supra* and *Smith* v. *Hooey*, *supra*. Unlike the *Ahrens* petitioners, Mr. Braden does not contest his present confinement and does not direct his quarrel at his current custodian.[3] Rather, he seeks to quash

[3] Of course, the existence of a detainer may also have impact on the petitioner's *current* confinement, for example, by rendering him ineligible for parole.

the Kentucky detainer because that State has refused to allow the resolution of the pending charges and has failed to afford the speedy trial to which the petitioner is constitutionally entitled.[8] State remedies having been exhausted by the petitioner, the most appropriate court to resolve this type of dispute is the federal court in Kentucky.

The dissenters in *Ahrens* perceptively anticipated that such potential problems might arise from the implications of the majority decision:

> If this is or is to become the law, the full ramifications of the decision are difficult to forsee. It would seem that a great contraction of the writ's classic scope and exposition has taken place, and much of its historic efficacy may have been destroyed. For if absence of the body from the jurisdiction is alone conclusive against existence of power to issue the writ, what of the case where the place of imprisonment, whether by private or public action, is unknown? What also of the situation where that place is located in one district, but the jailer is present in and can be served with process only in another? And if the place of detention lies wholly outside the territorial limits of any federal jurisdiction, although the person or persons exercising restraint are clearly within reach of such authority, is there to be no remedy, even though it is American citizens who are wrongfully deprived of their liberty and Americans answerable to no other power who deprive them of it, whether purporting to act officially or otherwise? In all these case may the

[8] Unfortunately, this reluctance to comply with the requirements of *Smith* v. *Hooey*, *supra*, occurs frequently. See Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 Crim. L. Bull. 753, 754 (1971).

> jailers stand in defiance of federal judicial power, and plead either the accident of the locus of detention outside the court's territorial limitations, or their own astuteness in so selecting the place, to nullify judicial competence? 335 U.S. at 195 (footnotes omitted).

Some of these problems have been alleviated by legislation. See 28 U.S.C. Sections 1391(e), 2241(d), 2255.[4] Others have been resolved by the decisions of this Court making the writ responsive to new classes of petitioners. See, e.g., *Strait* v. *Laird, supra; Peyton* v. *Rowe, supra; Hirota* v. *MacArthur*, 338 U.S. 197 (1948).

That is the approach which is required here. *Ahrens* is not an insurmountable barrier to the result petitioner seeks. Read in light of the policy problems with which the majority there was concerned, *Ahrens* can be viewed as a decision premised on traditional venue considerations. The Second and Fourth Circuits have properly so interpreted it. In *Word* v. *North Carolina*, 406 F.2d 352 (4th Cir. 1969), the Fourth Circuit characterized *Ahrens* as "little more than a precatory direction." 406 F.2d at 359. And the Second Circuit noted that:

> . . . the most convincing rationale for the *Ahrens* decision—the goal of insuring that an application for a writ of habeas corpus will be considered by the district court best suited to grant the relief sought—provides no stronger support for extension of the *Ahrens* rule to the facts before us than do the factors articulated

[4] The interstate Agreement on Detainers goes far toward eliminating the problems posed by the instant case. See, generally, Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 Crim. L. Bull. 753 (1971). While most States are parties to the Agreement, Alabama and Kentucky, unfortunately, are not. *Id.* at 756-57, n. 21.

by the Court in the *Ahrens* opinion. *United States ex rel. Meadows* v. *New York, supra* 426 F.2d at 1182.

Thus, the result in *Ahrens* was premised on a balancing of venue considerations. Such factors require the opposite result here.

Similar considerations also underlay the legislative history detailed in *Ahrens*. A ruling that the courts below had jurisdiction to entertain petitioner's application is not inconsistent with that history.

In attempting to discern the meaning of the phrase "within their respective jurisdictions", as contained in the Act of February 5, 1867, 14 Stat. 385, this Court noted that the addition of the language had been the result of an expressed Congressional concern that the bill, as originally introduced in the Senate, might permit "a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont or in any of the further States." Cong. Globe, 39th Congress, 2nd Session 730. As a result the language in question was added. *Id.*, at 790. But this concern, emphasized in *Ahrens*, supports rather than undermines the petitioner's position. For, as the Second Circuit has stated,

> Should we hold that a district judge in . . . the very district in which [petitioner] was sentenced, cannot entertain his petition, the fears expressed on the floor of Congress would be realized, for then, a district judge sitting in the State of Florida would have the duty to adjudicate an application for habeas corpus presented by a petitioner . . . in custody pursuant to the laws of Vermont. *United States ex rel. Meadows* v. *New York, supra*, 426 F.2d at 1181.

Accord, *Word* v. *North Carolina, supra,* 406 F.2d at 359-360. The federal court in Kentucky is the suitable forum to decide whether the State of Kentucky has violated Braden's Sixth Amendment rights. As Judge Bratcher correctly concluded in granting Braden's petition:

> "Since it is the State of Kentucky which must take action, it follows that jurisdiction rests in this district which has jurisdiction over the necessary state officials." *Braden* v. *Thirtieth Judicial Circuit Court of the Commonwealth of Kentucky,* —— F. Supp. ——, No. 6793 (W.D. Ky., Feb. 25, 1971), Memorandum Opinion, p. 3.

The reasoning in cases such as *Meadows, supra,* and the position of the petitioner here are thus in accord with the Congressional concerns enunciated in 1867: "The court best situated to grant this relief is a district court located in the state of [sentencing]." *United States ex rel. Meadows* v. *New York, supra,* 426 F.2d at 1183.

The result sought by petitioner is not only consonant with the legislative history identified in *Ahrens,* but also it does not conflict with the policy considerations of concern to the Court, primarily the wholesale transportation of prisoners. In *United States* v. *Hayman,* 342 U.S. 205, 220-223 (1951), this Court had no difficulty in assuring the lower federal courts that the interstate transportation of prisoners for Section 2255 hearings could be accomplished via the "All Writs Act," 28 U.S.C. §1651. Furthermore, and as demonstrated by this case, the physical presence of the petitioner is not always necessary to an adjudication of the issue. In those cases where it becomes clear that the presence of the petitioner is required, additional considerations compel

a holding that the state from which the detainer has issued or the sentence was rendered is a permissible forum. For example, to hold that a prisoner, seeking to challenge a future restraint imposed by a state other than the one in which he is incarcerated, must proceed in a remote state without witnesses who, for the most part, are undoubtedly in the demanding state, would serve to work an unconscionable denial of due process and would severely undermine *Peyton* v. *Rowe, supra.* Moreover,

> granting jurisdiction only to the state of confinement would prejudice not only the petitioner but also the respondent for the officials of the sentencing state rather than the state of incarceration are chiefly interested in the validity of the challenged conviction [or detainer] and, consequently, in opposing or, if the public interest so dictates, advocating the grant of the writ. *United States ex rel. Meadows* v. *New York, supra,* 426 F.2d at 1181.

In sum, a decision holding that jurisdiction exists below will not necessarily result in the wholesale transportation of state prisoners. Nor will it cause any greater practical difficulties than are manifest in the administration of Section 2255. Finally, such a decision will have the advantage of enabling challenges to detainers to be heard in the most appropriate and convenient federal forum.

C. *A petitioner's choice of forum should prevail.*

If, as we urge, the Court holds that the Western District of Kentucky had jurisdiction to entertain the petitioner's habeas corpus application, then a major problem will have

been resolved. But related problems will persist, as they did in the wake of *Nelson* v. *George*, 399 U.S. 224 (1970) where a decision on the central issue in the present case was not forthcoming. *Nelson* perpetrated a split among the circuits on the various problems attendant upon interstate detainers.

Four approaches have emerged. First, some courts have held that only the district of confinement has jurisdiction, e.g., *United States ex rel. Van Scoten* v. *Pennsylvania*, 404 F.2d 767 (3rd Cir. 1968). Others have held, with limited exceptions, that only the demanding or sentencing district has jurisdiction. See *Word* v. *North Carolina*, *supra*. A third holding, represented by *United States ex rel. Meadows* v. *New York*, *supra*, is that jurisdiction in the two districts is concurrent, with a preference for the demanding or sentencing jurisdiction. Finally, it has been held that jurisdiction lies in the district of confinement, but if the demanding jurisdiction follows a *Word*-type rule, transfer of the case to that district may be appropriate. *George* v. *Nelson*, 410 F.2d 1179 (9th Cir. 1969), *aff'd on other grds.*, 399 U.S. 224 (1970).

Certainly the most drastic consequence of this uncertainty is the plight of an inmate confined in a jurisdiction which adheres to the *Word* rule (i.e. that relief should be sought in the demanding state) with a detainer filed against him by a state, such as Kentucky, which lies within a circuit which adheres to a strict *Ahrens* rule. Such a prisoner "will, in classic renvoi terms, be snubbed by the federal court in the district of his confinement *and* by the federal court in the demanding district each court contending that he ought to seek relief in the other district." Wexler and Hershey, *Criminal Detainers in a Nutshell*, *supra* at 722.

See e.g., *United States ex rel. Pitcher* v. *Pennsylvania*, 314 F. Supp. 1329 (E.D. Pa. 1970).

Amicus suggests that in order to avoid such dilemnas, petitioners such as the one here should be afforded a choice of forums, thus allowing them to file their applications in either district. Jurisdiction in the detaining district can be premised on an agency theory, see *Word* v. *North Carolina*, *supra*, 406 F.2d 358, n. 6, cf. *Strait* v. *Laird*, 32 L. Ed.2d 141 (1972), or can be found to exist because of the effects of the detainer on a prisoner's current confinement. Cf. *Carafas* v. *La Vallee*, *supra*, *Peyton* v. *Rowe*, *supra*. The important point is that this Court should adopt the concurrent jurisdiction theory enunciated by the Second Circuit in *Meadows*, but with the caveat that the original choice of forums may be made, as here, by the petitioner himself. Cf. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1946) ("... unless the balance is strongly in favor of the [respondents', the petitioner's] choice of forum should rarely be disturbed.") The policy considerations discussed above justify such a conclusion, and issues of convenience can be resolved through the mechanism of 28 U.S.C. Section 1404a.

CONCLUSION

For the reasons set forth above the decision of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

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August 1972

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In The

Supreme Court of the United States

October Term, 1972

No. 71-6516

CHARLES D. BRADEN ..... PETITIONER

Vs.

28th JUDICIAL CIRCUIT COURT
OF KENTUCKY ..... RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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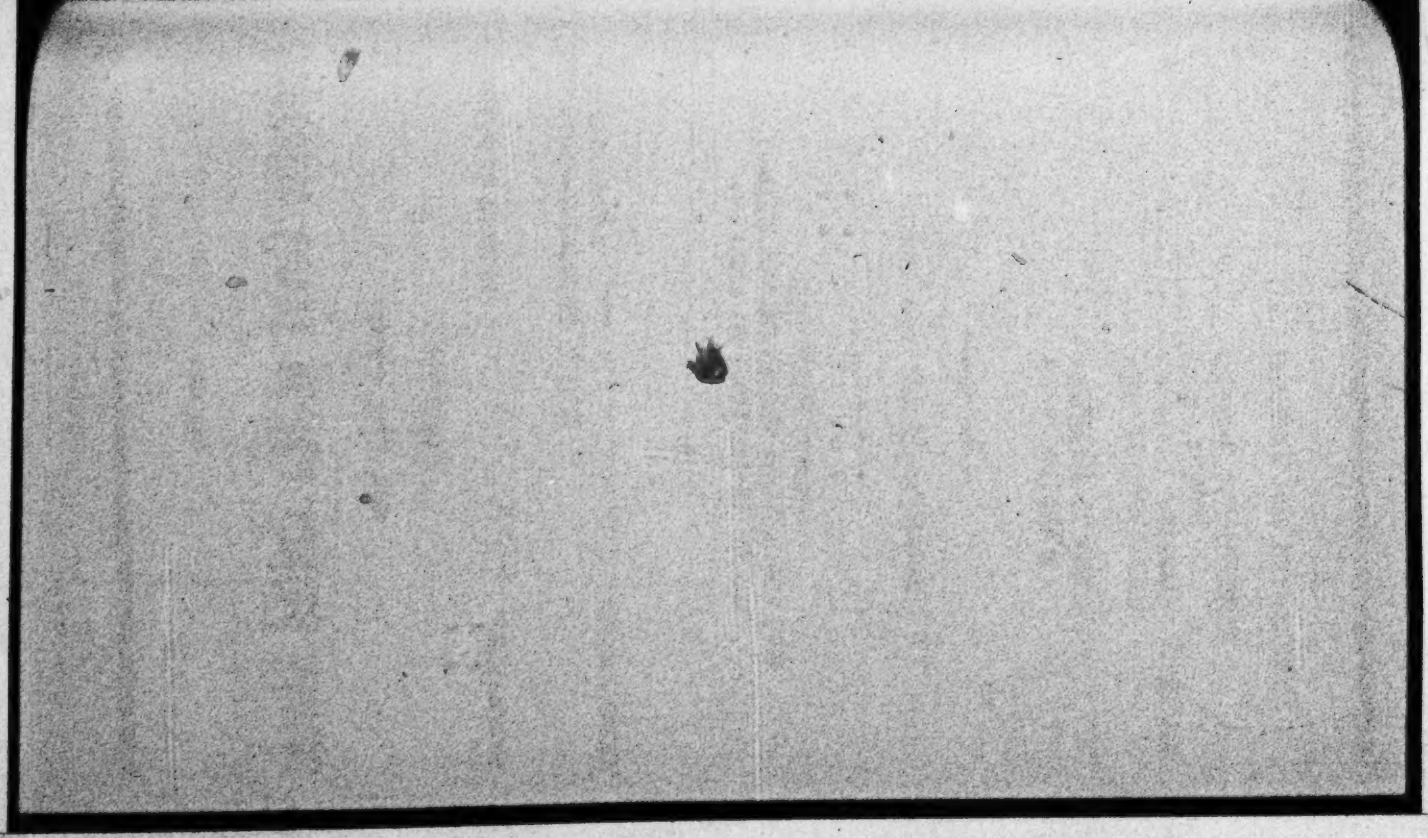

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In The

Supreme Court of the United States

October Term, 1972

No. 71-6316

CHARLES D. BRADEN ---------- *PETITIONER*

Vs.

30TH JUDICIAL CIRCUIT
COURT OF KENTUCKY ---------- *RESPONDENT*

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

WHETHER THIS CASE IS A PROPER ONE FOR THIS COURT'S RECONSIDERATION OF ITS DETERMINATION IN *NELSON V. GEORGE* TO LEAVE TO CONGRESS THE RESOLUTION OF THE INTERSTATE HABEAS CORPUS JURISDICTIONAL PROBLEM; WHETHER THAT DETERMINATION IS IN ANY EVENT FOR THE CONSIDERATION OF THE UNITED STATES CONGRESS AND NOT THIS COURT.

STATEMENT OF THE CASE

Petitioner has accurately stated the case and that statement is accepted by the respondent. However, we do emphasize that the Commonwealth of Kentucky previously returned the petitioner for trial on the indictments in question from the distant state of California and that petitioner would have received the speedy trial of which he now complains but for his own escape.

SUMMARY OF ARGUMENT

The case at bar is not a proper case for this court's reconsideration of its decision in *Nelson v. George*, 399 U.S. 224 (1970) to leave to Congress the resolution of the interstate habeas corpus jurisdictional problem. This petitioner is unlike the petitioners in *Smith v. Hooey*, 393 U.S. 374 (1969), *Peyton v. Rowe*, 391 U.S. 54 (1968), and *Word v. North Carolina*, 406 F.2d 352 (4th Cir. 1969). Petitioner was afforded a speedy trial at the expense of Kentucky and would have received that which he now demands but for his own conduct. We are cognizant of the relief provided individuals under the holdings of the aforementioned cases; however, the factual distinction to which we have alluded sets the instant case apart from *Smith*, *Peyton* and *Word*. Therefore, due to this controlling factual difference, the case at bar is not a proper one for a deviation from this Court's opinion in *Nelson*, supra.

In any event, establishment of jurisdiction of United States Courts is vested in Congress by Article III, Sections I and II of the United States Constitution, and Congress has fixed habeas corpus jurisdiction of United States District Courts exclusively in the district of confinement.

ARGUMENT

THIS CASE IS NOT A PROPER ONE FOR THIS COURT'S RECONSIDERATION OF ITS DETERMINATION IN *NELSON V. GEORGE* TO LEAVE TO CONGRESS THE RESOLUTION OF THE INTERSTATE HABEAS CORPUS JURISDICTIONAL PROBLEM; THIS DETERMINATION IS IN ANY EVENT FOR THE CONSIDERATION OF THE UNITED STATES CONGRESS AND NOT THIS COURT.

There is indeed irreconcilable conflict among the various circuit courts on the question of the territorial jurisdiction of United States District Courts to entertain writs of habeas corpus

when the petitioner is incarcerated in one district and the custodial authority from which he seeks relief is in another.

In *Ahrens v. Clark*, 335 U.S. 188 (1948), this Court confided that Federal habeas corpus jurisdiction is vested exclusively in the court where the petitioner is confined. The recent trend in extraterritorial use of the Great Writ has resulted in vigorous and frequent attacks on the continuing vitality of the *Ahrens* view. However, in *Nelson v. George*, 399 U.S. 224, this Court stated:

> "The legislative history of the 1966 amendments to 28 USC § 2241(d) (1964 ed,Supp V) suggests that Congress may have intended to endorse and preserve the territorial rule of Ahrens to the extent that it was not altered by those amendments. See HR Rep No. 1894, 89th Cong, 2d Sess, 1-2 (1966). See also S Rep No. 1502, 89th Cong, 2d Sess (1966). Those changes were made by Congress, of course, prior to our decision in Peyton v. Rowe; necessarily Congress could not have had the multistate problem with which we are now confronted in mind. Whether, in light of the legislative history of § 2241(d) and the changed circumstances brought about by Peyton v. Rowe, the rigor of our Ahrens holding may be reconsidered is an issue upon which we reserve judgment.
>
> "However, we note that prisoners under sentence of a federal court are confronted with no such dilemma since they may bring a challenge at any time in the sentencing court irrespective of where they may be incarcerated. 28 USC § 2255. It is anomalous that the federal statutory scheme does not contemplate affording state prisoners that remedy. *The obvious, logical, and practical solution is an amendment to § 2241 to remedy the shortcoming that has become apparent following the holding in Peyton v. Rowe. Sound judicial administration calls for such an amendment.*" (Emphasis added).

It is noteworthy in this respect that legislation to remedy the instant jurisdictional problem is pending in Congress and

has been referred to the House Judiciary Committee. H.R. 3804, Congressional Record 117, Part II, page 1860.

Notwithstanding *Nelson v. George* and the actual pendency of this question before the Congress, petitioner seeks to overturn *Ahrens v. Clark* in this proceeding. There are two sound reasons, we submit, why the Court should not do so. In the first place, petitioner is in an anomalous position to be raising the question. He admits that the State of Kentucky has already returned him from California to the State of Kentucky at state expense for the trial he now seeks. Petitioner cites no authority for the proposition that a state must bear the expense of returning a defendant for trial as often as he can escape, and we are aware of none. At least to the extent that he is entitled to immediate return for trial at state expense, petitioner, through his criminal act of escape, has foreclosed himself from relief by his voluntary rejection of the speedy trial which was afforded him.

In the second place, Congress has clearly fixed habeas corpus jurisdiction in the district of confinement to the exclusion of any other, and any right petitioner has must be enforced in that district.

It has frequently been asserted that it is the prerogative of this Court to crash through the jurisdictional barrier of *Ahrens* 335 U.S. 188 and extend the jurisdiction of district courts in habeas corpus proceedings to any district in which a petitioner may have a complaint. We do not agree. Article III, Sections I and II, of the United States Constitution vests in the Congress of the United States the power to establish United States courts and to fix their jurisdiction. Congress has clearly vested the habeas corpus jurisdiction of the United States District Courts in the district of confinement by 28 U.S.C. § 2241, and in *Ahrens v. Clark*, this Court precisely so held. There has been ample opportunity since the recent extraterritorial expansion of habeas corpus principles, and particularly the decision in *Nelson v. George*, for Congress to act if it disagrees with the construction of 28 U.S.C.

§ 2241 under *Ahrens v. Clark*, supra. Failure of Congress to act must be deemed as congressional approval of that construction.

The vigorous attacks on *Ahrens v. Clark*, supra, are pitched largely on the argument that there are many habeas corpus rights for which a petitioner would have no remedy in the absence of extension of habeas corpus jurisdiction to districts other than those where the petitioner is confined. The argument is that this Court should ignore jurisdictional law in order to fashion a remedy for a right which has been recognized. We believe this argument focuses in the wrong area. Jurisdiction is clearly fixed in the court of confinement. If any remedy is to be fashioned by the courts, it must be fashioned in that territorial district. If there is an unqualified right to speedy trial relief under circumstances such as those existing in this case, then it must be within the jurisdiction of the court in the district of confinement to make such a declaration. The absence of personal jurisdiction over a defendant state or an officer thereof would, we respectfully submit, be no more of a bar to relief in such an action than it is in a divorce proceeding or any other type of *in rem* action. Where it is the defendant's relationship in his rights as against the state which is in issue, and a district court has jurisdiction over the person of the petitioner as it undoubtedly does and over that subject matter, the right to grant relief would adhere in the same court.

Moreover, this frequently advanced argument of impossibility and unavailability of remedy clearly overlooks other judicial processes which might be available. For instance, it overlooks the potential availability of relief under the Declaratory Judgment Act as alluded to by the court below. See footnote 1, Braden v. 30th Judicial Circuit Court of Kentucky, 454 F.2d 145 (6th Cir. 1972).

In summary, we reiterate that this petitioner who escaped from his speedy trial confinement is in no position to complain on that score. If he is, the remedy, we submit, is not an uncon-

stitutional legislative-type enlargement of habeas corpus jurisdiction by this Court, but rather a judicial application that the proper rule of law is in the district of confinement, the court having jurisdiction, or a judicial application of the proper law in a declaratory judgment.

In other words, the Congress has by 28 U.S.C. § 2241 stated within the powers entrusted to it under the United States Constitution in which court this litigation should be brought. Judicial instruction should focus on the application of the appropriate remedy in that court and not on an unconstitutional usurpation of legislative powers by a rejection of the jurisdictional limitations fixed by Congress long ago.

We might add that, on balance, it would appear simpler and less expensive for the State of Kentucky to litigate such questions in one of its own Federal judicial districts. However, it is within the competence of Congress to determine where habeas corpus actions must be brought and, as this Court held in *Ahrens v. Clark*, 335 U.S. 188, Congress has already made that determination in a different way.

CONCLUSION

Based upon the foregoing reasons, we respectfully submit that the judgment of the lower court was correct and should be affirmed. Should the Court feel otherwise, we submit that this case should be remanded for consideration of the effect of petitioner's escape upon his right to demand speedy trial relief.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BRADEN *v.* 30TH JUDICIAL CIRCUIT COURT OF KENTUCKY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-6516. Argued December 5, 1972—Decided February 28, 1973

Petitioner, imprisoned in Alabama, applied to the District Court for the Western District of Kentucky for a writ of federal habeas corpus to compel the Commonwealth of Kentucky to grant him a speedy trial on an indictment returned by the grand jury of respondent court regarding which Kentucky had lodged a detainer with Alabama. The District Court granted the writ, but the Court of Appeals reversed on the ground that 28 U. S. C. § 2241 (a), which provides that "[w]rits of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions" precluded granting the writ to a prisoner who was not physically present within the territorial limits of the district court. *Held:*

1. Under *Peyton* v. *Rowe*, 391 U. S. 54, which discarded the "prematurity doctrine" of *McNally* v. *Hill*, 293 U. S. 131, the petitioner was "in custody" within the meaning of 28 U. S. C. § 2241 (c) (3) for purposes of a habeas corpus attack on the Kentucky indictment underlying the detainer, even though he was confined in an Alabama prison. Pp. 4–5.

2. The exhaustion doctrine of *Ex parte Royall*, 117 U. S. 241, does not bar a petition for federal habeas corpus alleging, under *Smith* v. *Hooey*, 393 U. S. 374, a constitutional claim of present denial of a speedy trial, even though the petitioner has not yet been brought to trial on the state charge. The petitioner must, however, have exhausted available state court remedies for consideration of that constitutional claim. Pp. 5–9.

3. The jurisdiction of a district court considering a habeas corpus petition requires only that the court issuing the writ have jurisdiction over the custodian of the prisoner. Pp. 10–11.

4. *Ahrens* v. *Clark*, 335 U. S. 188, on which respondent relies, can no longer be viewed as requiring that habeas corpus petitions

Syllabus

be brought only in the district of the petitioner's confinement. Here, since respondent was properly served with process in the Western District of Kentucky, the Court of Appeals erred in concluding that the District Court should have dismissed the petition for lack of jurisdiction. Pp. 11–16.

454 F. 2d 145, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 71-6516

Charles D. Braden, Petitioner, *v.* 30th Judicial Circuit Court of Kentucky.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 28, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner is presently serving a sentence in an Alabama prison. He applied to the District Court for the Western District of Kentucky for a writ of federal habeas corpus, alleging denial of his constitutional right to a speedy trial, *Smith* v. *Hooey*, 393 U. S. 374 (1969), and praying that an order issue directing Kentucky to afford him an immediate trial on a then three-year-old Kentucky indictment. We are to consider whether, as petitioner was not physically present within the territorial limits of the District Court for the Western District of Kentucky, the provision of 28 U. S. C. § 2241 (a) that "[w]rits of habeas corpus may be granted by the . . . district courts . . . *within their respective jurisdictions*" (emphasis supplied), precluded the District Court from entertaining petitioner's application. The District Court held that the section did not bar its determination of the application. The court held further that petitioner had been denied a speedy trial and ordered respondent Kentucky officials either to secure his presence in Kentucky for trial within 60 days or to dismiss the indictment. The Court of Appeals for the Sixth Circuit re-

versed on the ground that "the habeas corpus jurisdiction conferred on the federal courts by 28 U. S. C. § 2241 (a) is 'limited to petitions filed by persons physically present within the territorial limits of the District Court.'" 454 F. 2d 145, 146 (1972). We granted certiorari. 407 U. S. 909 (1972). We reverse.

I

On July 31, 1967, the grand jury of the Jefferson County Circuit Court (30th Judicial Circuit of Kentucky) indicted petitioner on one count of storehouse breaking and one count of safebreaking. At the time of the indictment petitioner was in custody in California, and he was returned to Kentucky to stand trial on the indictment. But on November 13, 1967, he escaped from the custody of Kentucky officials and remained at large until his arrest in Alabama on February 24, 1968. Petitioner was convicted of certain unspecified felonies in the Alabama state courts, and was sentenced to the Alabama state prison where he was confined when he filed this action.

The validity of petitioner's conviction on the Alabama felonies is not at issue here, just as it was not at issue before the District Court for the Western District of Kentucky. Nor does petitioner challenge the "present effect being given the [Kentucky] detainer by the [Alabama] authorities . . ." *Nelson* v. *George*, 399 U. S. 224, 225 (1970). He attacks, rather, the validity of the Kentucky indictment which underlies the detainer lodged against him by officials of that State.

In a pro se application for habeas corpus relief to the Federal District Court in the Western District of Kentucky, petitioner alleged that he had made repeated demands for a speedy trial on the Kentucky indictment, that he had been denied his right to a speedy trial, that further delay in trial would impair his ability to defend himself, and that the existence of the Kentucky indict-

ment adversely affected his condition of confinement in Alabama by prejudicing his opportunity for parole. In response to an order to show cause, the Commonwealth of Kentucky argued that the District Court lacked jurisdiction because the petitioner was not confined within the district. Respondent added that "petitioner in the case at bar may challenge the legality of any of the adverse effects of any Kentucky detainer against him in Alabama by habeas corpus in the Alabama Federal District Court." App., at 6–7. The District Court held, citing *Smith* v. *Hooey*, 393 U. S. 374 (1969), that Kentucky must "attempt to effect the return of a prisoner from a foreign jurisdiction for trial on pending state charges when such prisoner so demands. . . . Since it is the State of Kentucky which must take action, it follows that jurisdiction rests in this district which has jurisdiction over the necessary state officials." App., at 9.

Under the constraint of its earlier decision,[1] the Court of Appeals reversed but stated that it "reach[ed] this conclusion reluctantly" because of the possibility that the decision would "result in Braden's inability to find a forum in which to assert his constitutional right to a speedy trial—a right which he is legally entitled to assert at this time under *Peyton* v. *Rowe*, 391 U. S. 54 (1968). This is a possibility because the rule in the Fifth Circuit, where [Braden] is incarcerated, appears to be that a district court in the state that has filed the detainer is the proper forum in which to file the petition. *See* May v. Georgia, 409 F. 2d 203 (5th Cir. 1969). *See also* Rodgers v. Louisiana, 418 F. 2d 237 (5th Cir. 1969). Braden thus may find himself ensnared in what has aptly been termed 'Catch 2254'—unable to vindicate his constitutional rights in either of the only two states that could possibly afford a remedy. *See* Tuttle, Catch

[1] *White* v. *Tennessee*, 447 F. 2d 1354 (CA6 1971).

2254: Federal Jurisdiction and Interstate Detainers, 32 U. Pitt. L. Rev. 489, 502–503 (1971)." 454 F. 2d, at 146–147.

II

We granted certiorari to resolve a sharp conflict among the federal courts[3] on the choice of forum where a prisoner attacks an interstate detainer on federal habeas corpus. Before turning to that question we must make clear that petitioner is entitled to raise his speedy trial claim on federal habeas corpus at this time. First, he is currently "in custody" within the meaning of the federal habeas corpus statute, 28 U. S. C. § 2241 (c)(3). Prior to our decision in *Peyton* v. *Rowe*, 391 U. S. 54 (1968), the "prematurity doctrine" of *McNally* v. *Hill*, 293 U. S. 131 (1934), would, of course, have barred his petition for relief.[4] But our decision in *Peyton* v. *Rowe* discarded the prematurity doctrine, which had permitted a prisoner to attack on habeas corpus only his current confinement, and not confinement that would be imposed in the future, and opened the door to this action.[5]

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[3] Compare *United States ex rel. Meadows* v. *New York*, 426 F. 2d 1176 (CA2 1970), and *Word* v. *North Carolina*, 406 F. 2d 352 (CA4 1969) (proper forum is in the demanding State), with *United States ex rel. Van Scoten* v. *Pennsylvania*, 404 F. 2d 767 (CA3 1968), *Ashley* v. *Washington*, 394 F. 2d 125 (CA9 1968), *Booker* v. *Arkansas*, 380 F. 2d 240 (CA8 1967) (proper forum is in the State of confinement).

[4] See generally Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1087–1093 (1970).

[5] In *Smith* v. *Hooey*, 393 U. S. 374 (1969), we considered a speedy trial claim similar to the one presented in the case before us, and we held that a State which had lodged a detainer against a petitioner in another State must, on the prisoner's demand, "make a diligent, good faith effort" to bring the prisoner to trial. *Id.*, at 383. But that case arose on direct review of the denial of relief by the state court, and we had no occasion to consider whether the same or similar claims could have been raised on federal habeas corpus. Yet it logically follows from *Peyton* v. *Rowe*, 391 U. S. 54 (1968), that

Second, petitioner has exhausted all available state remedies as a prelude to this action. It is true, of course, that he has not yet been tried on the Kentucky indictment, and he can assert a speedy trial defense when, and if, he is finally brought to trial. It is also true, as our Brother REHNQUIST points out in dissent, that federal habeas corpus does not lie, absent "special circumstances," to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court. *Ex parte Royall*, 117 U. S. 241, 253 (1886). Petitioner does not, however, seek at this time to litigate a federal defense to a criminal charge, but only to demand enforcement of the Commonwealth's affirmative constitutional obligation to bring him promptly to trial. *Smith* v. *Hooey*, 393 U. S. 374 (1969). He has made repeated demands for trial to the courts of Kentucky, offering those courts an opportunity to consider on the merits his constitutional claim of the *present* denial of a speedy trial. Under these circumstances it is clear that he has exhausted all available state court remedies for consideration of that constitutional claim, even though Kentucky has not yet brought him to trial.

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the claims can be raised on collateral attack. In this context, as opposed to the situation presented in *Peyton*, the "future custody" under attack will not be imposed by the same sovereign which holds the petitioner in his current confinement. Nevertheless, the considerations which were held in *Peyton* to warrant a prompt resolution of the claim also apply with full force in this context. 391 U. S., at 63–64. See *United States ex rel. Meadows* v. *New York*, 426 F. 2d 1176, 1179 (CA2 1970); *Word* v. *North Carolina*, 406 F. 2d 352, 353–355 (CA4 1969). Since the Alabama warden acts here as the agent of the Commonwealth of Kentucky in holding the petitioner pursuant to the Kentucky detainer, we have no difficulty concluding that petitioner is "in custody" for purposes of 28 U. S. C. § 2241 (c) (3). On the facts of this case we need not decide whether, if no detainer had been issued against him, petitioner would be sufficiently "in custody" to attack the Kentucky indictment by an action in habeas corpus.

The exhaustion doctrine is a judicially-created instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a "swift and imperative remedy in all cases of illegal restraint or confinement." *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A. C. 603, 609 (H. L.). It cannot be used as a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence. As applied in our earlier decisions, the doctrine

> "preserves the role of the state courts in the application and enforcement of federal law. Early federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second, [the doctrine] preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts, which can develop and correct errors of state and federal law and most effectively supervise and impose uniformity on trial courts." Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1094 (1970).

See *Darr* v. *Burford*, 339 U. S. 200, 204–206 (1950), and the case which overruled it, *Fay* v. *Noia*, 372 U. S. 391, 417–420 (1963). See also *Ex parte Royall*, *supra*, at 251–252; *Ex parte Hawk*, 321 U. S. 114 (1944); cf. *Younger* v. *Harris*, 401 U. S. 37 (1971); *Stefanelli* v. *Minard*, 342 U. S. 117 (1951).

The fundamental interests underlying the exhaustion doctrine have been fully satisfied in petitioner's situation. He has already presented his federal constitutional

claim of a *present* denial of a speedy trial to the courts of Kentucky. The state courts rejected the claim, apparently on the grounds that since he had once escaped from custody the Commonwealth should not be obligated to incur the risk of another escape by returning him for trial. Petitioner exhausted all available state court opportunities to establish his position that the prior escape did not obviate the Commonwealth's duty under *Smith* v. *Hooey*, *supra*. Moreover, petitioner made no effort to abort a state proceeding or to disrupt the orderly functioning of state judicial processes. He comes to federal court not in an effort to forestall a state prosecution, but to enforce the Commonwealth's obligation to provide him with a state court forum. He delayed his application for federal relief until the state courts had conclusively determined that his prosecution was temporarily moribund. Since petitioner began serving the second of two 10-year Alabama sentences in March of 1972, the revival of the prosecution may be delayed until as late as 1982. A federal habeas corpus action at this time and under these circumstances does not jeopardize any legitimate interest of federalism.[5]

[5] Cf. *Baker* v. *Grice*, 169 U. S. 284 (1898), where this Court held that a petitioner for a writ of habeas corpus had failed to exhaust state court remedies. In rejecting each of the grounds relied on by the federal court below in concluding that special circumstances warranted that court's immediate intervention, this Court stated:

"It is also said that since the trial of Hathaway and the granting of a new trial to him the case of the petitioner [Grice] has not been called for trial, and that two terms of court since the granting of a new trial to Hathaway had come and the second one was about expiring at the time when the petitioner filed his petition in the Circuit Court for this writ. Here again there is no allegation and no proof that any attempt had been made on the part of this petitioner to obtain a trial in the state court or that he had been refused such trial by that court upon any application which he made. It is the simple case of a failure to call the indictment for trial, the petitioner being in the meantime on bail and making no effort to

The Commonwealth apparently shares that view since it specifically concedes that petitioner has exhausted all available state remedies, Transcript of Oral Argument, at 41.

In the case before us the Court of Appeals held—not surprisingly, in view of the considerations discussed above—that even though petitioner had chosen the wrong forum, his speedy trial claim was one "which he is legally entitled to assert at this time under *Peyton* v. *Rowe*, 391 U. S. 54 (1968)." 454 F. 2d, at 146. And the District Court, which upheld on the merits petitioner's speedy trial claim, necessarily adopted that view. Indeed, the great majority of lower federal courts which have considered the question since *Smith* v. *Hooey*, *supra*, have reached this same, and indisputably correct, conclusion.[4]

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obtain a trial and evincing no desire by way of a demand that a trial in his case should be had.

"We do not say that a refusal to try a person who is on bail can furnish any foundation for a resort to the Federal courts, even in cases in which a trial may involve Federal questions, but in this case no refusal is shown. A mere omission to move the case for trial (the party being on bail) is all that is set up, coupled with the assertion that defendant was eager and anxious for trial, but showing no action whatever on his part which might render such anxiety and eagerness known to the state authorities." *Id.*, at 202–203.

Compare *Young* v. *Ragen*, 337 U. S. 235, 238–239 (1949); *Marino* v. *Ragen*, 332 U. S. 561, 563–570 (1947) (Rutledge, J., concurring).

[4] See *Chauncey* v. *Second Judicial District*, 453 F. 2d 389, 390 n. 1 (CA9 1971); *Beck* v. *United States*, 442 F. 2d 1037 (CA5 1971); *Kane* v. *Virginia*, 419 F. 2d 1360 (CA4 1970); *May* v. *Georgia*, 409 F. 2d 203 (CA5 1969); *White* v. *Coleman*, 341 F. Supp. 272, 274 (WD Ky. 1971) (*dictum*); *United States ex rel. Pitts* v. *Rundle*, 325 F. Supp. 480 (ED Pa. 1971) (*dictum*); *Williams* v. *Pennsylvania*, 315 F. Supp. 1261 (WD Mo. 1970) (*dictum*); *Varallo* v. *Ohio*, 312 F. Supp. 45 (ED Tex. 1970) (*dictum*); *Campbell* v. *Smith*, 308 F. Supp. 706 (SD Ga. 1970); *Piper* v. *United States*, 306 F. Supp. 1239 (Conn. 1969) (*dictum*); *United States ex rel. White* v. *Hocker*, 306 F. Supp. 455 (Nev. 1969). But see *Lawrence* v. *Blackwell*, 298 F. Supp. 708 (ND Ga. 1969); *Carnage* v. *Sanborn*, 304 F. Supp.

We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court. The contention in dissent that our decision converts federal habeas corpus into "a pretrial motion forum for state prisoners," wholly misapprehends today's holding.

III

Accordingly, we turn to the determination of the forum in which the petition for habeas corpus should be brought. In terms of traditional venue considerations, the District Court in the Western District of Kentucky is almost surely the most desirable forum for the adjudication of the claim.[7] It is in Kentucky, where all of the material events took place, that the records and witnesses pertinent to petitioner's claim are likely to be found. And that forum is presumably no less convenient for the respondent, the Commonwealth of Kentucky, than for the petitioner. The expense and risk of transporting the petitioner to the Western District of Kentucky, should his presence at a hearing prove necessary, would in all likelihood be outweighed by the difficulties of transporting records and witnesses from Kentucky to the district where petitioner is confined.[8] Indeed, respondent makes clear that "on balance, it would appear simpler and less expensive for the State of Kentucky to litigate such ques-

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857 (ND Ga. 1969); *Kirk* v. *Oklahoma*, 300 F. Supp. 453 (WD Okla. 1969) (alternative holding).

[7] See *United States* v. *Hayman*, 342 U. S. 205 (1952), discussing the legislative history of 28 U. S. C. § 2255; S. Rep. No. 1502, 89th Cong., 2d Sess., 2 (1966), discussing 28 U. S. C. § 2241 (d); Uniform Post-Conviction Procedure Act § 3; ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies § 1.4, at 28 (approved draft 1968); Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1161 (1970).

[8] S. Rep. No. 1526, 80th Cong., 2d Sess., 3 (1948).

tions [as those involved in this case] in one of its own Federal judicial districts." Brief for Respondent, at 6.

But respondent insists that however the balance of convenience might be struck with reference to the question of venue, the choice of forum is rigidly and jurisdictionally controlled by the provision of § 2241 (a) that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions.*" 28 U. S. C. § 2241 (a) (emphasis supplied). Relying on our decision in *Ahrens* v. *Clark*, 335 U. S. 188 (1948), they contend—and the Court of Appeals held—that the italicized words limit a District Court's habeas corpus jurisdiction to cases where the prisoner seeking relief is confined within its territorial jurisdiction. Since that interpretation is not compelled either by the language of the statute or by the decision in *Ahrens*, and since it is fundamentally at odds with the purposes of the statutory scheme, we cannot agree.

The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody. *Wales* v. *Whitney*, 114 U. S. 564, 574 (1885). In the classic statement:

> "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent." *In the Matter of Jackson*, 15 Mich. 417, 439–440 (1867), quoted with approval in *Ex parte*

Endo, 323 U. S. 283, 306 (1944); *Ahrens* v. *Clark*, 335 U. S. 188, 196–197 (1948) (Rutledge, J., dissenting).

Read literally, the language of § 2241 (a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Nevertheless, there is language in our opinion in *Ahrens* v. *Clark*, *supra*, indicating that the prisoner's presence within the territorial confines of the district is an invariable prerequisite to the exercise of the District Court's habeas corpus jurisdiction. In *Ahrens*, 120 German nationals confined at Ellis Island, New York, pending deportation sought habeas corpus on the principal ground that the removal orders exceeded the President's statutory authority under the Alien Enemy Act of 1798. They filed their petitions in the District Court for the District of Columbia, naming as respondent the Attorney General of the United States. Construing the statutory predecessor to § 2241 (a), we held that the phrase, "within their respective jurisdictions," precluded the District Court for the District of Columbia from inquiring into the validity of the prisoners' detention at Ellis Island, and we therefore affirmed the dismissal of the petitions on jurisdictional grounds.

Our decision in *Ahrens* rested on the view that Congress' paramount concern was the risk and expense attendant to the "production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape

afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose." 335 U. S., at 191. And we found support for that assumption in the legislative history of the Act.[9] During the course of Senate debate on the habeas corpus statute of 1867,[10] the bill was criticized on the grounds that it would permit "a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the state of Vermont or in any of the further states." Cong. Globe, 39th Cong., 2d Sess., 730. Senator Trumbull, sponsor of the bill, met the objection with an amendment adding the words, "within their respective jurisdictions," as a circumscription of the power of the district courts to issue the writ.[11]

But developments since *Ahrens* have had a profound impact on the continuing vitality of that decision. First, in the course of overruling the application of *Ahrens* to the ordinary case where a prisoner attacks the conviction and sentence of a federal or state court, Congress has indicated that a number of the premises which were thought to require that decision are untenable. A 1950 amendment to the habeas corpus statute requires that a collateral attack on a federal sentence be brought in the sentencing court rather than the district where the prisoner is confined. 28 U. S. C. § 2255. Similarly, a prisoner contesting a conviction and sentence of a state court of a State which contains two or more federal judicial districts, who is confined in a district within the

[9] But see Fairman, Some New Problems of the Constitution Following the Flag, 1 Stan. L. Rev. 587, 633-640 (1949).

[10] Act of February 5, 1867, 14 Stat. 385.

[11] As passed, the statute provided:

"That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, . . . shall have power to grant writs of habeas corpus . . . ." 14 Stat. 385.

State other than that in which the sentencing court is located, has the option of seeking habeas corpus either in the district where he is confined or the district where the sentencing court is located. 28 U. S. C. § 2241 (d).[13] In enacting these amendments Congress explicitly recognized the substantial advantages of having these cases resolved in the court which originally imposed the confinement or in the the court located nearest the site of the underlying controversy.[14] And Congress has further challenged the theoretical underpinnings of the decision by codifying in the habeas corpus statute a procedure we sanctioned in *Walker* v. *Johnston*, 312 U. S. 275, 284 (1941), whereby a petition for habeas corpus can in many instances be resolved without requiring the presence of the petitioner before the court that adjudicates his claim. 28 U. S. C. § 2243. See also *United States* v. *Hayman*, 342 U. S. 205, 222–223 (1952).[14]

This court, too, has undercut some of the premises of the *Ahrens* decision. Where American citizens confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus, we have held, if only implicitly, that the petitioners' absence from the district does not represent a jurisdictional ob-

[13] The amendment was adopted in 1966.

[14] See H. R. Rep. No. 1894, 89th Cong., 2d Sess. (1966); S. Rep. No. 1502, 89th Cong., 2d Sess. (1966) (legislative history of amendments to 28 U. S. C. § 2241 (d)); *United States* v. *Hayman*, 342 U. S. 205 (1952) (discussing legislative history of 28 U. S. C. § 2255). Of course, these amendments were not motivated solely by a desire to insure that the disputes could be resolved in the most convenient forum. It was also a critical part of the congressional purpose to avoid the vastly disproportionate burden of handling habeas corpus petitions which had fallen, prior to the amendments, on those districts in which large numbers of prisoners are confined.

[14] See Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1189–1191 (1970).

stacle to the consideration of the claim. *Burns* v. *Wilson*, 346 U. S. 137 (1953); 346 U. S. 844, 851–852 (opinion of Frankfurter, J., at the denial of rehearing); cf. *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955); *Hirota* v. *MacArthur*, 338 U. S. 197, 199 (1948) (DOUGLAS, J., concurring).

A further, critical development since our decision in *Ahrens* is the emergence of new classes of prisoners who are able to petition for habeas corpus because of the adoption of a more expansive definition of the "custody" requirement of the habeas statute. See *Peyton* v. *Rowe*, 391 U. S. 54 (1968); *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); *Jones* v. *Cunningham*, 371 U. S. 236 (1963). The overruling of *McNally* v. *Hill*, *supra*, made it possible for prisoners in custody under one sentence to attack a sentence which they had not yet begun to serve. And it also enabled a petitioner held in one State to attack a detainer lodged against him by another State. In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State,[13] and the custodian State is presumably indifferent to the resolution of the prisoner's attack on the detainer. Here, for example, the petitioner is confined in Alabama, but his dispute is with the Commonwealth of Kentucky, not the State of Alabama. Under these circumstances it would serve no useful purpose to apply the *Ahrens* rule and require that the action be brought in Alabama. In fact, a slavish application of the rule would jar with the

[13] Nothing in this opinion should be taken to preclude the exercise of concurrent habeas corpus jurisdiction over the petitioner's claim by a federal district court in the district of confinement. But as we have made clear above, that forum will not in the ordinary case prove as convenient as the district court in the State which has lodged the detainer. Where a prisoner brings an action in the district of confinement attacking a detainer lodged by another State, the court can, of course, transfer the suit to a more convenient forum. 28 U. S. C. § 1404 (a). *Hoffman* v. *Blaski*, 363 U. S. 335 (1960).

very purpose underlying the addition of the phrase, "within their respective jurisdictions." We cannot assume that Congress intended to require the Commonwealth of Kentucky to defend its action in a distant State and to preclude the resolution of the dispute by a federal judge familiar with the laws and practices of Kentucky.[16] See *United States ex rel. Meadows* v. *New York*, 426 F. 2d 1176, 1181 (CA2 1970); *Word* v. *North Carolina*, 406 F. 2d 352 (CA4 1969).

IV

In view of these developments since *Ahrens* v. *Clark*, we can no longer view that decision as establishing an inflexible, jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision.[17] Of course, in many instances the district in which petitioners are held will be the most convenient forum for the litigation of their claims. On the facts of *Ahrens* itself, for example, petitioners could have challenged their detention by bringing an action in the Eastern District of

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[16] Obviously, since petitioner could not have presented his habeas corpus claim prior to our 1968 decision in *Peyton* v. *Rowe*, *supra*, and since the choice-of-forum provisions in the habeas corpus statute were most recently amended in 1966, see n. 13, *supra*, we can hardly draw any inference from the fact that the amendment did not specifically overrule *Ahrens* with respect to the type of case now before us.

[17] In *Nelson* v. *George*, 399 U. S. 224, 228 n. 5 (1970), we adverted to, but reserved judgment on, the precise question at issue here. We did point out, however, that the "obvious, logical, and practical solution is an amendment to § 2241 to remedy the shortcoming that has become apparent following the holding in *Peyton* v. *Rowe*. Sound judicial administration calls for such an amendment." We note that an amendment to § 2241 drafted by the Administrative Conference of the United States Courts was introduced during the 92d Congress, but no action was taken upon it.

New York against the federal officials who confined them in that district. No reason is apparent why the District of Columbia would have been a more convenient forum, or why the Government should have undertaken the burden of transporting 120 detainees to a hearing in the District of Columbia. Under these circumstances, traditional principles of venue would mandate the bringing of the action in the Eastern District of New York, rather than the District of Columbia. *Ahrens* v. *Clark* stands for no broader proposition.

Since the petitioner's absence from the Western District of Kentucky did not deprive that court of jurisdiction, and since the respondent was properly served in that district, see *Strait* v. *Laird*, 406 U. S. 341 (1972); *Schlanger* v. *Seamans*, 401 U. S. 487 (1971), the court below erred in ordering the dismissal of the petition on jurisdictional grounds. The judgment of the Court of Appeals is reversed and the case is remanded for proceedings consistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 71-6516

Charles D. Braden, Petitioner, v. 30th Judicial Circuit Court of Kentucky.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 28, 1973]

MR. JUSTICE BLACKMUN.

I concur in the result. The conclusion the Court reaches is not unexpected when one notes the extraordinary expansion of the concept of habeas corpus effected in recent years. See *Ex parte Hull*, 312 U. S. 546 (1941); *Ex parte Endo*, 323 U. S. 283 (1944); *Jones* v. *Cunningham*, 371 U. S. 236 (1963); *Peyton* v. *Rowe*, 391 U. S. 54 (1968); *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); *Nelson* v. *George*, 399 U. S. 224 (1970). Cf. *Schlanger* v. *Seamans*, 401 U. S. 487 (1971). A trend of this kind, once begun, easily assumes startling proportions. The present case is but one more step, with the Alabama warden now made the agent of the Commonwealth of Kentucky.

I do not go so far as to say that on the facts of this case the result is necessarily wrong. I merely point out that we have come a long way from the traditional notions of the Great Writ. The common law scholars of the past hardly would recognize what the Court has developed, see 4 Blackstone, Commentaries *131–134 (1765), and they would, I suspect, conclude that it is not for the better.

The result in this case is not without its irony. The petitioner's speedy trial claim follows upon his escape from Kentucky custody after that State, at its expense,

had returned the petitioner from California to stand trial in Kentucky. Had he not escaped, his Kentucky trial would have taken place five years ago. Furthermore, the petitioner is free to assert his speedy trial claim in the Kentucky courts if and when he is brought to trial there. And the claim, already strong on the facts here, increases in strength as time goes by.

SUPREME COURT OF THE UNITED STATES

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Charles D. Braden,
Petitioner,
v.
30th Judicial Circuit Court of Kentucky.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 28, 1973]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL concur, dissenting.

Today the Court overrules *Ahrens* v. *Clark*, 335 U. S. 188 (1948), which construed the legislative intent of Congress in enacting the lineal predecessor of 28 U. S. C. § 2241. Although considerations of "convenience" may support the result reached in this case, those considerations are, in this context, appropriate for Congress, not this Court, to make. Congress has not legislatively overruled *Ahrens*, and subsequent "developments" are simply irrelevant to the judicial task of ascertaining the legislative intent of Congress in providing, in 1867, that federal district courts may issue writs of habeas corpus "within their respective jurisdictions" for prisoners in the custody of state authorities. The Court, however, not only accomplishes a feat of judicial prestidigitation, but without discussion or analysis, explicitly extends the scope of *Peyton* v. *Rowe*, 391 U. S. 54 (1968), and implicitly rejects *Ex parte Royall*, 117 U. S. 241 (1886).

I

In order to appreciate the full impact of the Court's decision, a brief reiteration of the procedural stance of the case at the time the petition for habeas corpus was filed is necessary. Petitioner was incarcerated in Alabama pursuant to a state court judgment, the validity

of which petitioner does not attack. Petitioner had been indicted in Kentucky and a detainer filed by Kentucky authorities with the Alabama authorities. Kentucky had conducted no proceedings against petitioner; no judgment of conviction on the Kentucky indictment had been obtained. From Alabama petitioner requested Kentucky authorities to ask the Alabama authorities to deliver him to Kentucky so that petitioner could be tried on the Kentucky indictment. No action was taken on this request, and the Kentucky Supreme Court refused to issue a writ of mandamus requiring Kentucky authorities to request that Alabama deliver petitioner for trial in Kentucky. Petitioner then filed the instant habeas corpus proceeding in Kentucky, contending that he was "in custody" of Kentucky authorities and that "custody" was illegal because he had been denied his right to a speedy trial. Petitioner is not seeking to attack collaterally a state judgment of conviction in federal court. In substance, petitioner is seeking, prior to trial, to force the State of Kentucky to litigate a question that otherwise could only be raised as an absolute defense in a state criminal proceeding against petitioner.

II

The first inquiry is whether a state prisoner can, prior to trial, raise the claim of the denial of a right to a speedy trial by petitioning a federal court for writ of habeas corpus. The Court reasons that since *Peyton* v. *Rowe*, *supra*, "discarded the prematurity doctrine," *ante*, at ——, "petitioner is entitled to raise his speedy trial claim on federal habeas corpus."

Petitioner filed this petition alleging federal jurisdiction pursuant to 28 U. S. C. §§ 2241, 2254. Section 2254 pertains only to a prisoner in custody pursuant to a *judgment of conviction* of a state court; in the context of the attempt to assert a right to a speedy trial, there

is simply no § 2254 trap to "ensnare" petitioner, such as the court below felt existed. The issue here is whether habeas corpus is warranted under § 2241 (c)(3); that section empowers district courts to issue the writ, *inter alia*, before a judgment is rendered in a criminal proceeding. It is in the context of an application for federal habeas corpus by a state prisoner prior to any trial in a state court that the effect of the instant decision must be analyzed.

The Court reasons that since *Smith* v. *Hooey*, 393 U. S. 374 (1969), held that a State must, consistent with the Sixth and Fourteenth Amendments, "make a diligent, good-faith effort to bring" a prisoner to trial on a state indictment even though he is incarcerated in another jurisdiction, and, since *Peyton* v. *Rowe*, *supra*, overruled "the prematurity doctrine," therefore a prisoner can attack in a federal habeas corpus proceeding the validity of an indictment lodged against him in one State even though he is imprisoned in another. I cannot agree with this reasoning.

In *Smith*, this Court held that a State must make an effort to try a person even though he was incarcerated in another jurisdiction. That case did not, however, involve federal habeas corpus. It came here on certiorari after the state court had denied a petition for a writ of mandamus seeking to have the underlying indictment dismissed. The Texas Supreme Court had ruled that the state courts had no power to order the federal prisoner produced for trial on the state indictment. This Court reversed, holding that, in view of the Sixth and Fourteenth Amendment guarantees of a speedy trial, the State must, after demand therefor, attempt to obtain the prisoner from the sovereignty with custody over the prisoner.

It by no means follows, however, that a state prisoner can assert the right to a speedy trial in a federal district court. The fundamental flaw in the reasoning of the

Court is the assumption that since a prisoner has some "right" under *Smith* v. *Hooey*, *supra*, he must have some forum in which affirmatively to assert that right, and that therefore the right may be vindicated in a federal district court under § 2241 (c)(3). *Smith* v. *Hooey* did not, however, establish that a right distinct from the right to a speedy trial existed. It merely held that State could not totally rely on the fact that it could not order that a prisoner be brought from another jurisdiction as a justification for not attempting to try the defendant as expeditiously as possible. The right to a speedy trial is, like other constitutional rights, a defense to a criminal charge, but one which, unlike others, increases in terms of potential benefit to the accused with the passage of time. *Barker* v. *Wingo*, 407 U. S. 514 (1972). The fact that a State must make an effort to obtain a defendant from another sovereign for trial but fails, after demand, to make an effort would weigh heavily in the defendants favor. But *Smith* v. *Hooey* does not necessarily imply that federal courts may, as the District Court did in this case, in effect issue an injunction requiring a state court to conduct a criminal trial. If the State fails to perform its duty, *Smith* v. *Hooey*, it must face the consequences of possibly not obtaining a conviction, *Barker* v. *Wingo*. But the fact that the State has a duty by no means leads to the conclusion that the failure to perform that duty can be raised by a prospective defendant on federal habeas corpus in advance of trial. The history of habeas corpus and the principles of federalism strongly support the approach established by *Ex parte Royall*, *supra*, that, absent extraordinary circumstances, federal habeas corpus should not be used to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court.

The Court's reasoning for allowing a state prisoner to resort to federal habeas corpus is that the prisoner is attacking the validity of a "future custody." The Court relies on *Peyton* to justify federal jurisdiction. *Peyton*, however, was in a significantly different procedural posture than the instant case. There the Court held that a state prisoner could challenge the constitutional validity of a sentence which he had not yet begun to serve when he was currently incarcerated pursuant to a valid conviction and sentence, but the sentence he sought to attack was to run consecutively to the valid sentence. Even though a person may be "in custody" for purposes of §§ 2241 (c)(3), or 2254, if he has not yet begun to serve a sentence entered after a judgment of conviction, as the Court held in *Peyton*, it by no means follows that he is similarly "in custody" when no judgment of conviction has been entered or even any trial on the underlying charge conducted. The Court's suggestion that a person may challenge by way of federal habeas corpus any custody that might possibly be imposed at some time in the "future," which suggestion unwarrantedly assumes both that a constitutional defense will be rejected and that the jury will convict, is not supported by the language or reasoning of *Peyton*. Mr. Chief Justice Warren, writing for the Court in *Peyton*, emphasized the role of federal habeas corpus for state prisoners as "substantially a post-conviction device," 391 U. S., at 60, and "the instrument for resolving fact issues not adequately developed in the original proceedings." *Id.*, at 63. The Court there stated that the demise of the *McNally* rule would allow prisoners "the opportunity to challenge defective convictions." *Id.*, at 65.

The Court here glosses over the disparate procedural posture of this case, and merely asserts, without analyzing the historical function of federal habeas corpus for

state prisoners, that the rationale of *Peyton* is applicable to a pretrial, preconviction situation. Citation to that decision can not obscure the fact that the Court here makes a significant departure from previous decisions, a departure that certainly requires analysis and justification more detailed than that which the Court puts forth.

There is no doubt that a prisoner such as petitioner can assert, by appropriate motion in the courts of the State in which the indictment was handed down, that he should be brought to trial on that charge. *Smith* v. *Hooey*, *supra*. There is also no doubt that such a prisoner *may petition* a federal district court for a writ of habeas corpus prior to trial. See 28 U. S. C. § 2241 (c)(3). What the Court here disregards, however, is almost a century of decisions of this Court to the effect that federal habeas corpus for state prisoners, prior to conviction, should not be granted absent truly extraordinary circumstances.

In *Ex parte Royall*, *supra*, the petitioner was indicted in state court for selling a bond coupon without a license. Prior to trial on that indictment, he petitioned in federal court for a writ of habeas corpus, contending that the statute upon which the indictment was predicated violated the contract clause, insofar as it was applied to owners of coupons. In holding that the (then) Circuit Court had the power to issue the writ but had properly exercised its discretion not to do so, the Court wrote:

> "That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good required that those relations be not disturbed by unnecessary conflict between 'courts equally bound to guard and protect rights secured by the Constitution.'" 117 U. S., at 251.

The judicial approach set forth in *Ex parte Royall*—that federal courts should not, absent extraordinary circumstances, interfere with the judicial administration and process of state courts prior to trial and conviction, even though the state prisoner claims that he is held in violation of the Constitution—has been consistently followed. *Cook* v. *Hart*, 146 U. S. 183 (1892) (custody alleged to violate Art. 4, § 2); *New York* v. *Eno*, 155 U. S. 89 (1894) (custody alleged to violate Supremacy Clause); *Whitten* v. *Tomlinson*, 160 U. S. 231 (1895) (custody alleged in violation of Constitution due to improper extradition); *Drury* v. *Lewis*, 200 U. S. 1 (1906) (custody alleged to violate Supremacy Clause). Cf. *Ex parte Fonda*, 117 U. S. 516 (1886); *In re Duncan*, 139 U. S. 449 (1891); *In re Wood*, 140 U. S. 278 (1891); *In re Frederich*, 149 U. S. 70 (1893). The situations in which pretrial or preconviction federal interference by way of habeas corpus with state criminal processes is justified involve the lack of jurisdiction, under the Supremacy Clause, for the State to bring any criminal charges against the petitioner. *Wildenhus's Case*, 120 U. S. 1 (1887); *In re Loney*, 134 U. S. 372 (1890); *In re Neagle*, 135 U. S. 1 (1890).

The effect of today's ruling that federal habeas corpus prior to trial is appropriate because it will determine the validity of custody that *may* be imposed in actuality only sometime in the indefinite future constitutes an unjustifiable federal interference with the judicial administration of a State's criminal laws. The use of federal habeas corpus is, presumably, limited neither to the interstate detainer situation nor to constitutional right secured by the Sixth and Fourteenth Amendments. The same reasoning would apply to a state prisoner who alleges that "future custody" will result because the State plans to introduce at a criminal trial sometime in the future a confession allegedly obtained in violation of the Fifth

and Fourteenth Amendments, or evidence obtained in violation of the Fourth and Fourteenth Amendments. I thoroughly disagree with this conversion of federal habeas corpus into a pretrial motion forum for state prisoners.

III

In addition to sanctioning an expansion of *when* a federal court may interfere with state judicial administration, the Court overrules *Ahrens* v. *Clark*, *supra*, and expands the parameters of which federal courts may so intervene. In *Ahrens*, the Court held that "the presence within the territorial jurisdiction of the District Court of the person detained is [a] prerequisite to filing a petition for writ of *habeas corpus*." 335 U. S., at 189. The Court construed the phrase "within their respective jurisdictions" to mean that Congress intended to limit the jurisdiction of a district court to prisoners in custody within its territorial jurisdiction. *Id.*, at 193.

The Court here says that the "language" of *Ahrens* "indicates" the result reached below. The explicit holding of the Court, however, is plainly much more than an "indication."

> "Thus the view that the jurisdiction of the District Court to issue the writ in cases such as this is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court is supported by the language of the statute, by considerations of policy, and by the legislative history of the enactment. We therefore do not feel free to weigh the policy considerations which are advanced for giving district courts discretion in cases like this. *If that concept is to be imported into this statute, Congress must do so.*" *Id.*, at 192–193 (emphasis added; footnote omitted).

The result reached today may be desirable from the point of view of sound judicial administration, see *Ahrens* v. *Clark*, *supra*, at 101; *Nelson* v. *George*, 399 U. S. 224, 228 n. 5 (1970). It is the function of this Court, however, to ascertain the intent of Congress as to the meaning of "within their respective jurisdictions." Having completed that task in *Ahrens*, it is the function of Congress to amend the statute if this Court misinterpreted congressional intent or if subsequent developments suggest the desirability, from a policy viewpoint, of alterations in the statute. See *Cleveland* v. *United States*, 329 U. S. 14 (1946). We noted in *Nelson* that the resolution of any apparent dilemma "caused" by this Court's holding in *Ahrens* is appropriately one to be undertaken by Congress. 399 U. S., at 228 n. 5. Legislative "inaction" in amending a statute to comport with this Court's evaluation of "sound judicial administration" hardly warrants the disingenuous reading of a previous decision to achieve the result that Congress, despite judicial prodding, has refused to mandate. However impatient we may be with a federal statute which sometimes may fail to provide a remedy for every situation, one would have thought it inappropriate for the Court to amend the statute by judicial action.

The Court lists several "developments" that have somehow undercut the validity, in the Court's opinion, of the statutory interpretation of the phrase "within their respective jurisdictions." As the amended § 2255 is relevant only to *federal* prisoners collaterally attacking a conviction, and as § 2241 (d) applies only to *intrastate* jurisdiction, the relevance of the amendments with respect to the jurisdictional requirement of § 2241 (c)(3) is not a little obscure. The interpretation of the phrase "within their respective jurisdictions" in *Ahrens* is hardly incompatible with these recent amendments of statutes

dealing with situations not involving the interstate transportation of state prisoners. The further argument that *Burns* v. *Wilson*, 346 U. S. 137 (1953), "undermines" *Ahrens* overlooks the fact that the Court in *Ahrens* specifically reserved that question, 355 U. S., at 192 n. 4, the resolution of which is by no means an explicit rejection of *Ahrens*. Finally, the fact that this Court has expanded the notion of "custody" for habeas corpus purposes hardly supports, much less compels, the rejection of a statutory construction of an unrelated phrase.

In the final analysis, the Court apparently reasons that since Congress amended other statutory provisions dealing with habeas corpus, therefore the congressional intent with respect to the meaning of an unamended phrase must somehow have changed since the Court previously ascertained that intent. This approach to statutory construction, however, justifies, with as much, if not more, force, the result reached below: Congress, aware of this Court's interpretation of the phrase in *Ahrens*, deliberately chose not to amend § 2241 (c)(3) when it selectively amended other statutory provisions dealing with federal habeas corpus. Indeed, the most recent indications of legislative intent support this conclusion rather than that advanced by the Court. See H. R. Rep. No. 1894, 89th Cong., 2d Sess., 1–2 (1966); S. Rep. No. 1502, 89th Cong., 2d Sess. (1966). See also n. 13, *ante*, at ——.

I would adhere to this Court's interpretation of the legislative intent set forth in *Ahrens* v. *Clark*, *supra*, and leave it to Congress, during the process of considering legislation to amend this section, to consider and to weigh the various policy factors that the Court today weighs for itself.